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IN THE

Supreme Court of the United States

October Term, 1969
No. 971

STATE OF CALIFORNIA,

Petitioner,

vs.

LEON PHILLIP BELOUS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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Petition for Writ of Certiorari to the Supreme Court of the State of California

The State of California prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in the above case on September 5, 1969.

Introduction

The California State Supreme Court found California Penal Code section 274 unconstitutional.[1] California Penal Code section 274 provided:

> "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

[1]Penal Code section 274 has been amended by the Therapeutic Abortion Act. See appendix D.

Opinions Below

The opinion of the Supreme Court of the State of California, printed in Appendix A hereto, is reported in 71 A.C. 996, 458 P. 2d 194, 80 Cal. Rptr. 354 (Sept. 5, 1969). The August 13, 1968, opinion of the Court of Appeal of the State of California 2d Crim. No. 13618, non-published, is printed in Appendix B.

Jurisdiction

The Supreme Court of the State of California entered judgment in this case on September 5, 1969. A timely Petition for Rehearing, filed on September 19, 1969, was denied on October 1, 1969.

Petitioner invokes the jurisdiction of this court under 28 U.S.C. section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.[2]

Questions Presented

1. Is the term "necessary to preserve her life" sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights?

2. Does the State of California have a sufficient compelling interest to allow the state to regulate a woman's fundamental right to terminate unborn life?

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[2]Although the decision of a State Appellate Court reversing a judgment ordinarily remands the matter to the lower court for retrial, since the charging statute was declared unconstitutional, there is no statute applicable to respondent. Therefore, the decision of the California Supreme Court is final.

Statutes Involved

The constitutional and statutory provisions are set forth in Appendix A. They are: United States Constitution, Fourteenth Amendment; California Penal Code section 274.

Statement of the Case

The grand jury of the County of Los Angeles indicted respondent in Count I for conspiracy to commit a crime, a violation of California Penal Code section 182. [Clk. Tr. p. 1.][3] Respondent was indicted in Count II for abortion, a violation of section 274 of the Penal Code. [Clk. Tr. p. 2.] Respondent was found guilty of both counts. [Clk. Tr. pp. 45-47.] The Judgment was affirmed by the Court of Appeal in a non-published decision. On appeal to the Supreme Court of California, the conviction was reversed by a 4 to 3 vote. Petitioner's Petition for Rehearing was denied.

Statement of Facts

Respondent, who is a licensed physician in the State of California, sent the abortee to the individual who actually performed the abortion. [Rep. Tr. p. 14.] Respondent told the abortee that the abortion would cost $500.00. [Rep. Tr. p. 14.] The individual who performed the abortion would customarily give respondent a portion of the fee that he received for the abortion. [Rep. Tr. p. 160.]

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[3]"Clk. Tr." refers to the Clerk's Transcript and "Rep. Tr." refers to the Reporter's Transcript of the proceedings in the state trial court, enclosed as part of the record.

How the Federal Question Arose

At the very outset of its opinion, the Supreme Court of California made it clear that the controlling issue in the case was one arising under the Constitution of the United States:

> "We have concluded that the term 'necessary to preserve' in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights." 71 A. C. 996, 1002.

The court also got involved in the federal question of the fundamental right of a woman to choose whether to bear children. On pages 1005-1006, the court cites a series of cases decided by this court involving the "right of privacy" or "liberty" in matters related to marriage, family and sex. The court in discussing this fundamental right of a woman to choose whether to bear children, states at pages 1006-1007:

> "The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969) 37 U.S.L. Week 4333, 4339; Sherbert v. Verner (1963) 374 U.S. 398, 403), whether the regulation is 'necessary . . . to the accomplishment of a permissible state policy' (McLaughlin v. Florida (1964) 379 U.S. 184, 196; see also, N.A.A.C.P.

v. Button, 371 U.S. 415, 438; Bates v. Little Rock (1960) 361 U.S. 516, 527; Huntley v. Public Util. Com., 69 A.C. 62, 69; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21; People v. Woody, 61 Cal.2d 716, 718), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep" (Shelton v. Tucker (1960) 364 U.S. 479, 490; see also, Cantwell v. Connecticut (1940) 310 U.S. 296, 308; In re Berry, 68 Cal.2d 137, 151; In re Hoffman, 67 Cal.2d 845, 853-854)."

Whether or not the preservation of unborn life is a sufficient compelling interest, is clearly a federal question.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The Decision Below Presents a Federal Constitutional Question Not Previously Determined by This Court Which Is of Great Importance to the Administration of Criminal Justice

The California State Supreme Court decided a federal constitutional question not previously determined by this Court: whether the phrase "necessary to preserve her life" is void for vagueness.

The California State Supreme Court also involved itself with the federal question of whether an unborn child is enough of a compelling state interest to regulate a woman's fundamental right to choose whether to allow an unborn child to be born.

The California State Supreme Court found California Penal Code section 274 unconstitutional on the grounds that the phrase "necessary to preserve her life" is vague. Almost all of the states have substantially the same language in their anti-abortion statutes as California Penal Code section 274. This court has never determined whether the abortion statute of any state is vague. This court has also never made a determination whether a state may in fact interfere with a mother's choice of whether to allow her unborn child to be born.

2. The California Decision Is Contrary to the Decisions of All of the State Courts on This Question and This Conflict Among the Courts Must Be Resolved in Order to Restore Stability to the Administration of Criminal Justice

California Penal Code section 274 provided:

> "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life,* is punishable by imprisonment in the state prison not less than two nor more than five years." (Emphasis added.)

As pointed out above, the California State Supreme Court has been the *only* state appellate court to find that the phrase "necessary to preserve her life" is vague. Two other State Supreme Courts have recently held that such language is not vague.

In *State v. Moretti,* 52 N.J. 182 (1968), 244 A. 2d 499, the following statute was challenged as being unconstitutional:

> "Any person who, maliciously or *without lawful justification,* with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor. . . ." (Emphasis added.) N.J.S. 2A:87-1, N.J.S.A.

In holding that the phrase "lawful justification" was not vague and uncertain, the court stated at pages 504-506:

> "The defendants further contend that N.J.S. 2A:87-1, N.J.S.A. is so 'vague and indefinite' that it suffers a constitutional infirmity. This claim is based on the statutory language 'without lawful justification' which, it is argued, is so indefinite a concept that no one could tell when an abortion would be justified.
>
> "Clearly, a construction of the statute which confined the meaning of the phrase 'lawful justification, *to the preservation of the mother's life would avoid any constitutional attack based on vagueness*. See State v. Shapiro, 89 N.J.L. 319, 98 A. 437 N.J.L. 124, 58 A.2d 709 (Sup.Ct. 1948). Cf. State v. Baird, 50 N.J. 376, 235 A.2d 673 (1967); Sanitary Vendors, Inc. v. Byrne, 40 N.J. 157, 190 A.2d 876, 96 A.L.R. 2d 948 (1963); State v. Hudson County News Co., 35 N.J. 284, 173 A.2d 20 (1961). . . .
>
> ". . . . The only inquiry before us is whether these defendants had sufficient warning that their conduct was criminal. A contention that a statute violates due process because of vagueness is based on the theory the defendant had no fair warning that his conduct was proscribed. Thus, a defendant whose conduct was such that he clearly could tell that it was prohibited will not be heard to say that the statute is overly broad and that another, in some hypothetical case, could be misled. In United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561, rehear-

ing denied 372 U.S. 961, 86 S.Ct. 1011, 10 L.Ed. 2d 13 (1963), the defendant challenged as unconstitutionally vague section 3 of the Robinson-Patman Act (15 U.S.C. § 13a) which makes it a crime to sell goods at 'unreasonably low prices for the purpose of destroying competition or eliminating a competitor.' Despite the indefiniteness of the phrase 'unreasonably low prices,' the Court held that the defendants, who with the requisite intent had sold below cost, were adequately warned of the criminality of their conduct and that the statute was constitutional as applied to them. The Court said:

> 'Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L.Ed. 989, 996 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.' Id. at 32-33, 83 S. Ct. at 598, 9 L.Ed.2d at 565-566. (Emphasis added.)

If, therefore, the statute gave sufficient warning to these defendants that the abortion they contemplated was not lawfully justifiable and thus was criminal, the statute is constitutional as applied to them.[3] See United States v. Raines, 362 U.S. 17,

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[3] It must be noted that we are not dealing here with a statute restricting freedom of expression. As the Court said in United States v. National Dairy Products Corp.,

(This footnote is continued on the next page)

80 S.Ct. 519, 4 L.Ed.2d 524 (1960); Jordan v. DeGeorge, 341 U.S. 223, 231-232; 71 S.Ct. 703, 707-708, 95 L.Ed. 886, 892-893 (1951); United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541, 91 L.Ed. 1877, 1882-1883 (1947); United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930); State v. Monteleone, 36 N.J. 93, 99-100, 175 A.2d 207 (1961); State v. Suess, 236 Minn. 174, 183, 52 N.W.2d 409, 415 (1952); Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 617-20 (1962). See also, Sanitary Vendors, Inc. v. Byrne, supra, 40 N.J. at pp. 162-163, 190 A. 2d 876. . . .

"We conclude that the defendants here could not fail to be aware that the abortion they conspired to commit would violate the statute. The Appellate Division noted that the defendants offered no argument of lawful justification before that court. 97 N.J. Super. at p. 422, 235 A.2d 226. Before us, the defendants contend that they believed the abortion would be lawfully justified because it was to terminate an allegedly unwanted pregnancy.

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372 U.S. 29, 36, 83 S.Ct. 594, 599, 9 L.Ed.2d 561, 568, rehearing denied, 372 U.S. 961, 83 S.Ct. 1011, 10 L.Ed.2d 13 (1963):

'[T]he approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v. Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093, 1100 (1940); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 405. No such factor is present here where the statute is directed only at conduct designed to destroy competition [or to prohibit an abortion] activity which is neither constitutionally protected nor socially desirable.'

It is beyond comprehension that the defendants could have believed that our abortion statute envisioned lawful justification to exist whenever a woman wanted to avoid having a child. The statutes of no jurisdiction in this country permit such an excuse for an abortion. Even under the Model Penal Code, which substantially increases the reasons justifying an abortion, such 'justification' would not protect against criminal punishment. Model Penal Code § 230.3 (Proposed Official Draft 1961). Moreover, if the woman's mere desire not to have the child were justification for an abortion, the statute would be rendered meaningless since any abortion to which the woman consented would be deemed lawfully justified. If there could be any doubt of the defendants' knowledge that their actions were unlawful it would be dissipated by their surreptitious conduct revealed by the record—including the sending of the barber-examiner Gianettino on a nocturnal visit to Mrs. Swidler's home to perform the operation—and the statement ascribed to Gianettino by Mrs. Swidler that, when he telephoned to make the appointment for the operation, he told her: 'This is illegal, I could not possibly take a check from you.' (Emphasis added.)

"Under the circumstances of this case, the defendants are in no position to urge that the statute was too vague to warn them that their contemplated conduct was proscribed. Accordingly, we hold that the statute is constitutional as applied to them." (Emphasis added.)

The *Moretti* case was denied certiorari by this Court, 393 U.S. 952 (1968).

In *Kudish v. Board of Registration in Medicine,* 248 N.E. 2d 264 (June 2, 1969), the Supreme Judicial Court of Massachusetts had before it an attack on the constitutionality of the Massachusetts abortion act. The act provides in part:

> "Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine, or other noxious thing to be taken by her or, with the like intent, unlawfully uses any instrument or other means whatever, or, with like intent, aids or assists therein, shall . . . 'be punished.' " G.L. c. 272, § 19.

In holding that said act was not vague, the Court stated at pages 165-266:

> "Before us, the petitioner argues that the use of the word 'unlawfully' renders § 19 unconstitutionally vague, because there is no definition of what is unlawful. He cites no authority which supports this contention. *The broad contention that the statute is void for vagueness lacks support in the authorities.* See, for example, Commonwealth v. Daniel O'Connell's Sons, Inc., 281 Mass. 402, 183 N.E. 839; Commonwealth v. Carpenter, 325 Mass. 519, 91 N.E.2d 666; Alegata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201; Connally v. General Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Note, Due Process Requirements of Definiteness in Statutes, 62 Harv. L.Rev. 77; Comment, Legislation-Requirement of Definiteness in Statu-

tory Standards, 53 Mich.L.Rev. 264; Collings, Unconstitutional Uncertainty—An Appraisal, 40 Cornell L.Q. 195; Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa.L.Rev. 67.

"We are of the opinion that any uncertainty has been made sufficiently definite by decisions of this court. In our cases it has been stated over the years that *a physician may lawfully perform an abortion if he acts in good faith and in an honest belief that it is necessary for the preservation of the life or health of the woman.* Commonwealth v. Sholes, 13 Allen, 554, 558; Commonwealth v. Brown, 121 Mass. 69, 76-77, 82; Commonwealth v. Nason, 252 Mass. 545, 551, 148 N.E. 110; Commonwealth v. Corbett, 307 Mass. 7, 12, 29 N.E.2d 151; Commonwealth v. Wheeler, 315 Mass. 394, 395, 53 N.E.2d 4; Commonwealth v. Brunelle, 341 Mass. 675, 677-678, 171 N.E.2d 850." (Emphasis added.)

The United States District Court for the District of Columbia decided *United States of America v. Vuitch,* Crim. Nos. 1043-68; 1644-68, and *United States of America v. Boyd,* Crim. No. 1587-69, on November 10, 1969. The statute in question provided in part:

"Whoever . . . produces an abortion . . . on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned . . . ." Title 22, Sec. 201, of the D.C. Code.

The court, in holding the statute void, cited *People v. Belous*. This District of Columbia case demonstrates the diversity of opinion that exists from jurisdiction to jurisdiction.

Petitioner agrees with that part of the decision where the judge states ". . . A prompt appeal to the United States Supreme Court . . . is highly desirable."

The clear conflict which now exists among the highest courts of three states and the District of Columbia in the interpretation and application of such an important law, which affects one's federal constitutional rights, should not be allowed to exist. The present problems can only be multiplied as the courts of other states are presented with the issue. Meanwhile, individuals in the various states will receive unequal treatment because of the conflicting interpretations of a statute by the courts of the several states.[4]

Confusion and unequal treatment will continue until this court grants review and provides a definitive interpretation for all jurisdictions.

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[4]Although California has replaced Penal Code section 274 with the Therapeutic Abortion Act, there are many individuals in California now serving sentences in state prisons for violating Penal Code section 274. There are also many doctors either awaiting disciplinary proceedings or suffering penalties for violating section 274 of the Penal Code.

Conclusion

For the reasons discussed above, we respectfully submit that certiorari should issue to review the decision of the court below.

Respectfully submitted,

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APPENDIX "A".

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Respondent, v. Leon Phillip Belous, Defendant and Appellant. Crim. 12739.

Filed: Sept. 5, 1969.

Dr. Leon Phillip Belous was convicted in January 1967, after a jury trial, of abortion, in violation of section 274 of the Penal Code, and conspiracy to commit an abortion, in violation of section 182 of the Penal Code, both felonies. The court suspended proceedings, imposed a fine of $5,000, and placed Dr. Belous on probation for two years. He appeals from the order granting probation.

Dr. Belous is a physician and surgeon, licensed since 1931 to practice medicine in the State of California, and specializing in obstetrics and gynecology. He has been on the attending staff of the gynecology department of Cedars of Lebanon Hospital in Los Angeles since 1931, is a fellow of the Los Angeles Gynecology and Obstetrical Society, the American College of Obstetrics and Gynecology, the Abdominal Surgical Society, and the Geriatric Society, and a member of the American Board of Obstetrics and Gynecology. He is on the Board of Directors of the California Committee on Therapeutic Abortion, an organization which seeks to liberalize abortion laws. He is considered by his associates to be an eminent physician in his field.

The prosecution's witnesses, a young woman and her husband, Cheryl and Clifton, testified to the following:

In 1966, Cheryl, then unmarried, believed she was pregnant. A family physician had given her pills which would induce menstruation if she were not pregnant, but the pills did not work. She and Clifton had sometime earlier seen Dr. Belous on television, advocating a change in the California abortion laws. They had never heard of Dr. Belous before. Clifton obtained the doctor's phone number from the television station and phoned Dr. Belous; he explained the problem and that they both were "pretty disturbed," and at their "wits' end" and asked for Dr. Belous' help. Dr. Belous told him there was nothing he could do, but Clifton "continued pleading," and threatened that Cheryl would go to Tijuana for an abortion. Finally the doctor agreed to see them at his office.

Dr. Belous examined Cheryl at his Beverly Hills office and confirmed that she was possibly pregnant. Cheryl was otherwise in good health. The visit lasted about 45 minutes and was very emotional. Both Clifton and Cheryl pleaded for help, cried, insisted they were going to have an abortion "one way or another." The doctor lectured them on the dangers of criminal abortions, and Tijuana abortions in particular, and suggested that they get married. He insisted he did not perform abortions. He refused to recommend anyone in Tijuana. Finally, in response to their pleadings, Dr. Belous gave them a piece of paper with a Chula Vista phone number. He told them an abortion would cost about $500. He gave Cheryl a prescription for some antibiotics and instructed her to return for an examination.

Dr. Belous testified that he was very familiar with the abortion business in Tijuana. He had visited the clinics there to learn about conditions and knew that women who went to Tijuana were taking their lives in their hands. He met Karl Lairtus while in Tijuana and knew from personal observation that Lairtus, licensed to practice in Mexico but not in California, was performing skilled and safe abortions in Mexico. Lairtus wanted to obtain a California license, and sought out Belous' help on a number of occasions. When Lairtus moved from Mexico to Chula Vista, he gave Dr. Belous his address and phone number. When Lairtus moved to Los Angeles, he gave the doctor a Hollywood address, and made it known to the doctor that he was performing abortions. It was Lairtus' number that Belous gave to Cheryl and Clifton. Although he had given out Lairtus' number before, in similar situations, where distraught pregnant women insisted they would do anything, Dr. Belous had no idea how many women actually went to Lairtus.

Cheryl and Clifton made arrangements with Lairtus, and went to the address which Lairtus gave them on the phone. After the abortion was performed, while Cheryl was resting, the police, having been advised by another woman that Lairtus was performing abortions at that address, came to his apartment, followed another couple into the apartment and arrested Lairtus. They found two notebooks containing women's names, ages, dates of last menstruation, and physician's names, including Dr. Belous' name, which the police interpreted as the referring doctor with whom Lairtus was to split his fees. On the basis of this information, Dr. Belous was arrested at his office. Lairtus pleaded guilty. At

Dr. Belous' trial, he testified that, although not solicited, he sent Dr. Belous about $100 as a professional courtesy in about half the cases that he had performed abortions on Dr. Belous' patients. Dr. Belous denied receiving any money from Lairtus.

The substance of Dr. Belous' defense was that he gave Lairtus' phone number to Cheryl and Clifton only because he believed that they would, in fact, do anything to terminate the pregnancy, which might involve butchery in Tijuana or self-mutilation; that in face of their pleading and tears, he gave out the phone number of someone whom he knew to be a competent doctor, although unlicensed in this state. The doctor believed that if the young couple carried out their threats, Cheryl's very life was in danger.

Section 274 of the Penal Code, when the conduct herein involved occurred, read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years."

The statute was substantially unchanged since it was originally enacted in 1850.[1] In 1967, the statute was

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[1]Stats. 1850, ch. 99, § 45, at p. 233: "[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: *Provided,*

amended and sections 25950 through 25954 ("Therapeutic Abortion Act") added to the Health and Safety Code. The act extends the lawful grounds for obtaining an abortion.[2] Section 274 is directed towards the abortionist. Under section 275 of the Penal Code (also amended by the Therapeutic Abortion Act), a woman who solicits or submits to an abortion is punishable by up to five years' imprisonment; similarly, under section 276, any person who solicits a woman to submit to an abortion is punishable by up to five years' imprisonment.

We have concluded that the term "necessary to preserve" in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements, without improperly infringing on fundamental constitutional rights.

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that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

[2]Penal Code, section 274, as amended reads: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *except as provided in the Therapeutic Abortion Act . . . of the Health and Safety Code*, is punishable by imprisonment in the state prison . . ." (Stats. 1967, ch. 327, § 3, at p. 1523; italics added.)

The Therapeutic Abortion Act (Health & Saf. Code, §§ 25950-25954) authorizes abortions "only" if the abortion takes place in an accredited hospital (§ 25951, subd. (a)); the abortion is approved by a hospital staff committee consisting of at least three licensed physicians and surgeons (§ 25951, subd. (b)); and there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (§ 25951, subd. (c) (1)); the pregnancy resulted from rape or incest (§ 25951, subd. (c) (2)); or the woman is under 15 years of age (§ 25952, subd. (c)).

"The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . . "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." ' (*Lanzetta v. New Jersey*, 306 U.S. 451, 453 [59 S.Ct. 618, 83 L.Ed. 888]; see also *Connally v. General Const. Co.*, 269 U.S. 385, 391 [46 S.Ct. 126, 70 L.Ed. 322].) Such also is the law of the State of California. (*People v. McCaughan*, 49 Cal.2d 409, 414 [317 P.2d 974].)

"The required meaning, certainty and lack of ambiguity may appear on the face of the questioned statute or from any demonstrably established technical or common law meaning of the language in question. (*People v. McCaughan, supra*, 49 Cal.2d 409, 414; *Lorenson v. Superior Court*, 35 Cal.2d 49, 60 [216 P.2d 859].)" (In re Newbern, 53 Cal.2d 786, 792.) The requirement of certainty in legislation is greater where the criminal statute is a limitation on constitutional rights. (See Smith v. California (1959) 361 U.S. 147, 151.) On the other hand, mathematical certainty is not required; "some matter of degree" is involved in most penal statutes. (Nash v. United States (1913) 229 U.S. 373, 377.)

Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, "necessary" or "preserve." There is, of course, no standard defini-

tion of "necessary to preserve," and taking the words separately, no clear meaning emerges. "Necessary" is defined as: "1. Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; . . ." (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that " 'necessary' has not a fixed meaning, but is flexible and relative." (Westphal v. Westphal, 122 Cal.App. 379, 382; see also, City of Dayton v. Borchers (Ohio Common Pleas, 1967) 232 N.E.2d 437, 441 ["A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness."].)

The definition of "preserve" is even less enlightening. It is defined as: "1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; . . . To save from decomposition. . . . 3. To maintain; to keep up; . . ." (Webster's New International Dictionary, *supra.*) The meanings for "preserve" range from the concept of maintaining the status quo—that is, the woman's condition of life at the time of pregnancy—to maintaining the biological or medical definition of "life"—that is, as opposed to the biological or medical definition of "death".

Since abortion before quickening was not a crime at common law (Perkins, Criminal Law (1957) 101; Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality* (1968) 14 N.Y.L.F. 411, 419-422; Stern, *Abortion: Reform and the Law* (1968) 59 J. Crim. L.C. & P.S. 84, 85) we cannot rely on common law meanings or common law referents (see Loren-

son v. Superior Court, *supra*, 35 Cal.2d 49, 60; People v. Agnello, 259 Cal.App.2d 785, 790-791).[3]

Various possible meanings of "necessary to preserve . . . life" have been suggested. However, none of the proposed definitions will sustain the statute.

Respondent asserts: "If medical science feels the abortion should be performed as it is necessary to preserve her life, then it may be performed; that is, unless it is performed the patient will die."

Our courts, however, have rejected an interpretation of "necessary to preserve" which requires certainty of immediacy of death. (People v. Abarbanel, 239 Cal.App. 2d 31, 32, 35; People v. Ballard, 218 Cal.App.2d 295, 298; People v. Ballard, 167 Cal.App.2d 803, 807.) Justice Fourt, in People v. Ballard, *supra*, 167 Cal.App.2d 803, 814, stated: "Surely, the abortion statute (Pen. Code, § 274) does not mean by the words 'unless the same is necessary to preserve her life' that the peril of life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' [Citations.]" The above language was quoted in People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 34.

In People v. Ballard, *supra*, 167 Cal.App.2d 803, 813-814, the evidence established that the woman was

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[3]Compare United States v. Harriss (1954) 347 U.S. 612, 634 (dissenting opinion): "Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague."

"extremely nervous . . . upset, had headaches, was unable to sleep, and thought that she was pregnant. She was agitated, disturbed and had many problems." (Italics omitted.) In People v. Ballard, *supra,* 218 Cal. App.2d 295, 307, it was established that at the time each of the women went to the defendant doctor she was in a "bad state of health" because of self-imposed abortive practices. And in People v. Abarbanel, *supra,* 239 Cal.App.2d 31, the obstetrician performed the abortion after receiving letters from two psychiatrists to the effect that abortion was indicated as necessary to save the woman's life from the "possibility" of suicide. In each of the cases the conviction was reversed.

If the fact of ill health or the mere "possibility" of suicide is sufficient to meet the test of "necessary to preserve her life," it is clear that a showing of immediacy or certainty of death is not essential for a lawful abortion. Two other jurisdictions have also rejected an interpretation of "necessary to preserve" which would require certainty or immediacy of death. (State v. Dunklebarger (Iowa 1928) 221 N.W. 592, 596; State v. Hatch (Minn. 1917) 164 N.W. 1017.)

After the decision in *Ballard,* the Legislature did not amend the statute to repudiate the rule suggested by that case and to establish a definition requiring certainty of death.[4]

It would be anomalous to uphold a criminal statute against a charge of vagueness by adopting a construction of the statute rejected by the courts of this state as not reflecting legislative intent unless there was a

[4]The definitions suggested by the two *Ballard* cases and by *Abarbanel* will be discussed later in this opinion.

clear showing of a strong public policy or legislative intent requiring adoption of the rejected construction. No such showing has been made with regard to the construction urged by respondent.

Moreover, a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children.[5] The women's right to life is involved because childbirth involves risks of death.[6]

The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. (See, e.g., Griswold v. Connecticut, *supra*, 381 U.S. 479, 485, 486, 500; Loving v. Virginia (1967) 388 U.S. 1, 12 [statute prohibiting interracial marriages, violative of Due Process Clause]; Skinner v. Oklahoma (1942) 316 U.S. 535, 536, 541 [sterilization laws; marriage and procreation involve a "basic liberty"]; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535 [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 399-400 [prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal.2d

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[5]Dr. Belous' standing to raise this right is unchallenged. (Cf. Griswold v. Connecticut (1965) 381 U.S. 479, 481; Barrows v. Jackson (1953) 346 U.S. 249, 257; Parrish v. Civil Service Commission, 66 Cal.2d 260, 264.)

[6]E.g., The maternal death rate in 1966 was 0.5 per 100,000 population and 29.1 per 100,000 births. (Statistical Abstract of the United States (1968) table 73, at p. 58, table 68, at p. 55.) In California in 1966 the maternal death rate was 2.1 per 10,000 live births. (California Statistical Abstract (1968) table E-3, at p. 67.) As to a particular pregnant woman the risk of death may be greater or lesser.

711, 715; see also Custodio v. Bauer, 251 Cal.App.2d 303, 317-318.) That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See, e.g., Carrington v. Rash (1965) 380 U.S. 89, 96 [fundamental but nonenumerated right to vote]; Aptheker v. Secretary of State (1964) 378 U.S. 500, 505-506, and Kent v. Dulles (1958) 357 U.S. 116, 125 [right to travel]; Bolling v. Sharpe (1954) 347 U.S. 497, 500 [right to attend federal unsegregated schools]; Otsuka v. Hite, 64 Cal.2d 596, 602 [right to vote]; cf. Finot v. Pasadena City Bd. of Education, 250 Cal.App.2d 189, 199.) It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right.

The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969) 37 U.S.L. Week 4333, 4339; Sherbert v. Verner (1963) 374 U.S. 398, 403), whether the regulation is "necessary . . . to the accomplishment of a permissible state policy" (McLaughlin v. Florida (1964) 379 U.S. 184, 196; see also, N.A.A.C.P. v. Button, 371 U.S. 415, 438; Bates v. Little Rock (1960) 361 U.S. 516, 527; Huntley v. Public Util. Com., 69 A.C. 62, 69; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21; People v. Woody, 61 Cal. 2d 716, 718), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep" (Shelton v. Tucker (1960) 364 U.S. 479, 490; see also, Cantwell v. Connecticut (1940) 310 U.S. 296, 308; In re Berry, 68 Cal.2d 137, 151; In re Hoffman, 67 Cal.2d 845, 853-854).

It is possible that the definition suggested by respondent, requiring that death be certain, was that intended by the Legislature when the first abortion law was adopted in 1850 and that, in the light of the then existing medical and surgical science, the great and direct interference with a woman's constitutional rights was warranted by considerations of the woman's health. When California's first anti-abortion statute was enacted, any surgical procedure which entered a body cavity was extremely dangerous. Surgeons did not know how to control infection, and mortality was high. (Haagensen & Lloyd, A Hundred Years of Medicine (1943) p. 19.) In 1867, Joseph Lister first published his findings on antiseptic surgery (*id.*, at pp. 241-242), but even in 1883 the techniques he developed were condemned (*id.*, at p. 245), and as late as 1895 were not well understood or properly applied by even leaders of the medical profession. (*Id.*, at p. 246; see also, H. Robb (1895) Aseptic Surgical Technique.)

Although development was slow, techniques of antisepsis and asepsis became major general advances in surgery at and after the turn of the century. In due course safe procedures were developed for specific operations. Curettage, used for abortion in the first trimester, became a safe, accepted and routinely employed medical technique, especially after antibiotics were developed in the early 1940's. (Douglas, *Toxic Effects of the Welch Bacillus in Postabortal Infections* (1956) 56 N.Y.State J.Med. 3673.) It is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child.[7]

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[7]C. Tietze & H. Lehfeldt, *Legal Abortion in Eastern Europe* (April 1961) 175 J.A.M.A. 1149, 1152; see also V. Kolblova, *Legal Abortion in Czecheslovakia* (April 1966) 196 J.A.M.A.

Although abortions early in pregnancy and properly performed present minimal danger to the woman, criminal[8] abortions are "the most common single cause of maternal deaths in California." (Fox, *Abortion Deaths in California* (1967) 98 Am.J.Obst. & Gynec. 645, 650.) In California, it is estimated that 35,000 to 100,000 such abortions occur each year. (Fox, *supra,* at p. 645.)

The incidence of severe infection from criminal abortion is very much greater than the incidence of death. The Los Angeles County Hospital alone, for example, in 1961 admitted over 3,500 patients treated for such abortions. (Kistner, *Medical Indications for Contraception: Changing Viewpoints* (editorial) (1965) 25 Obst. & Gynec. 285, 286.) Possibly more significant than the mere incidence of infection caused by criminal abortions is the result of such infection. "Induced Illegal Abor-

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371; K.-H. Mehland, *Combatting Illegal Abortion in the Socialist Countries of Europe* (1966) 13 World Med.J. 84. There are, of course, no comparable data in the United States. However, in California from November 1967 through September 1968, 3,775 therapeutic abortions were reported without a maternal death. (See Annual Report on the Implementation of the Therapeutic Abortion Act, Department of Public Health, Bureau of Maternal and Child Health (January 1969), table 1.)

The only data contrary to the conclusions above is provided by amicus for respondent, relying on Swedish data showing that maternal mortality from abortion is slightly higher than maternal mortality from giving birth. The Swedish figures are, however, explainable by the fact that abortions in Sweden are often performed during late pregnancy. (See Tietze & Lehfeldt, *supra,* 175 J.A.M.A. 1149 (e.g., in 1949, 35 percent of Swedish abortions were performed after the first trimester); Hoffmeyer, *Medical Aspects of the Danish Legislation on Abortions* (1965) 17 W.Res.L.Rev. 529, 544-545.)

[8]The phrases "criminal abortion" and "illegal abortion" are used by the medical profession—and by legal commentators—to encompass all abortions obtained other than from a physician in an accepted surgical environment. Any use of the phrase "criminal abortion" or "illegal abortion" in this opinion merely adopts the common phraseology; no legal conclusion is intended.

tion . . . is one of the important causes of subsequent infertility and pelvic disease." (Kleegman & Kaufman, Infertility in Women (1966) p. 301; see also Curtis & Huffman, Gynecology (6th ed. 1950) pp. 565-566.)[9]

Amici for appellant, 178 deans of medical schools, including the deans of all California medical schools, chairman of medical school departments, and professors of medical schools state: "These recorded facts bring one face-to-face with the hard, shocking—almost brutal—reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge."[10]

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[9]There is considerable literature describing the experience of various hospitals with infected abortion. Hospital experience, however, can be assumed to be only the tip of the iceberg. Many badly infected women will be treated at home or in a doctor's office. (Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion* (March 1967) 199 J.A.M.A. p. 805.) See, for hospital data, Goodno, Cushner, Molumphey, *Management of Infected Abortion* (1963) 85 Am.J.Obst. & Gynec. 16 [Baltimore City Hospitals]; Knapp, Platt and Douglas, *Septic Abortion* (1960) 15 Obst. & Gynec. 344 [The New York Hospital]; Moritz & Thompson, *Septic Abortion* (1966) 95 Am.J. Obst. & Gynec. 46 [Miami Valley Hospital, Dayton, Ohio]; Stevenson & Yang, *Septic Abortion With Shock* (1962) 83 Am.J. Obst. & Gynec. 1229 [Detroit Receiving Hospital]; Studdiford & Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse* (1956) 71 Am.J. Obst. & Gynec. 842 [Bellevue Hospital, New York].)

[10]One of the amici in support of respondent agrees: "There is a substantial risk that abortions performed by persons unauthorized to practice surgery, carried out in unregulated places, will bring injury or even death to the mother."

Authorities recognizing and discussing the tragic health problem created by illegal abortions are legion. (See, e.g., Bates, *The Abortion Mill; An Institutional Study* (1954) 45 J.Crim. L.C. & P.S. 157; Eastman, Expectant Motherhood (3d ed. 1957) 106 et seq.; Gold, Erhardt, Jacobziner & Nelson, *Therapeutic Abortions in New York City: A 20-Year Review* (1965) 55 Am.J. Pub. Health 964, 970-971; Guttmacher (ed. 1967) The Case for Legalized Abortion Now; Lader (1966) Abortion; Leavy & Kummer, *Criminal Abortion; Human Hardship and Unyielding Laws* (1962) 35 So.Cal.L.Rev. 123; Lucas, *Federal Constitutional*

Although we may assume that the law was valid when first enacted, the validity of a law in 1850 does not resolve the issue of whether the law is constitutionally valid today. (Compare, e.g., Gray v. Sanders (1963) 372 U.S. 368, 381, with South v. Peters (1950) 339 U.S. 276, 277; Baker v. Carr (1962) 369 U.S. 186, 237, with Colegrove v. Green (1946) 328 U.S. 549, 556; Brown v. Board of Education (1954) 347 U.S. 483, 495; with Plessy v. Ferguson (1896) 163 U.S. 537, 550-551.)

Constitutional concepts are not static. Our United States Supreme Court said, regarding the equal protection clause of the Fourteenth Amendment: "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.' [Citation.] Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . ." (Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, 669; see also, Perez v. Sharp, *supra*, 32 Cal.2d 711, 727; Galyon v. Municipal Court, 229 Cal.App.2d 667, 671-672, and cases cited therein ["[A] statute valid when enacted may become invalid by change in the conditions to which it is applied."]. See also, Means, *supra*, 14 N.Y.L.F. 411, 514-515.)

Limitations on the Enforcement and Administration of State Abortion Statutes (1968) 46 N.C.L.Rev. 730; Niswander, *Medical Abortion Practices in the United States* (1965) 17 W.Res.L. Rev. 403.)

In the light of modern medical surgical practice, the great and direct infringement of constitutional rights which would result from a definition requiring certainty of death may not be justified on the basis of considerations of the woman's health, where, as here, abortion is sought during the first trimester.

It is next urged that the state has a compelling interest in the protection of the embryo and fetus[11] and that such interest warrants the limitation on the woman's constitutional rights. Reliance is placed upon several statutes and court rules which assertedly show that the embyro or fetus is equivalent to a born child. However, all of the statutes and rules relied upon require a live birth or reflect the interest of the parents.[12]

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[11]It has been pointed out that "embryo" is more accurately descriptive than "fetus" in the instant case. Webster's New International Dictionary, *supra,* states: ". . . In mammals . . . *embryo* is applied only to early stages passed within the mother's body; later (in human embryology, usually after the third month of development) the young is called a *fetus*. . . ." (Italics in original.)

[12]Statutes classifying the unborn child as the same as the born child require that the child be born alive for the provisions to apply. (E.g., Civ. Code, § 29 ["A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; . . ."]; Prob. Code, § 250 ["A posthumous child is considered as living at the death of the parent."]; Prob. Code, § 255 [An illegitimate child is the heir of his mother, "whether born or conceived."].)

Similarly, cases holding that a child can recover for injuries caused before his birth require that the child be born alive. The interest protected is that of the child; and the right attaches, not to the embryo or fetus, but to the living child. (Scott v. McPheeters, 33 Cal. App.2d 629, 637 [child injured at birth can bring action for injuries]; see also, Carroll v. Skloff (Penn. 1964) 202 A.2d 9, 11; Tomlin v. Laws (Ill. 1922) 134 N.E. 24, 25; Prosser, Law of Torts (3d ed. 1964) at p. 356 ["The child, provided that he is born alive, is permitted to maintain an action. . . ."].)

Where the embryo or fetus is allowed to assert rights before birth it is the prospective mother or parents who are bringing the

In any event, there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child. Probably the most important is reflected by the statute before us. The intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion. (Perkins, Criminal Law, *supra,* p. 103; Means, *supra,* 14 N.Y.L.F. at p. 445.)[13]

Furthermore, the law has always recognized that the pregnant woman's right to life takes precedence over

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action; thus it is their interest that the law protects. (Kyne v. Kyne, 38 Cal.App.2d 122, 127-128 [action on behalf of unborn child for support and to establish paternity]; People v. Sianes, 134 Cal.App. 355, 357-358 [criminal action for nonsupport against father of unborn child]; People v. Yates, 114 Cal.App. Supp. 782, 786 [same].) Similarly, in those jurisdictions which recognize a cause of action for the loss of an unborn child, it is the parents' "distressing wrong in the loss of a child" that the law has recognized. (Prosser, *supra,* § 56, at p. 357; Torigian v. Watertown News Co. Inc. (1967) 352 Mass. 446, 448.)

In a case involving a pregnant woman who refused a blood transfusion, in ordering the transfusion the court made clear that it was concerned with the woman, rather than the fetus: ". . . Mrs. Jones wanted to live." (Application of President & Directors of Georgetown Col. (D.C. Cir. 1964) 331 F.2d 1000, 1009, cert. denied, 377 U.S. 978; but see, Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson (N.J. 1964) 201 A.2d 537, 538, cert. denied, 377 U.S. 985, suggesting that an 8-month pregnant woman could be required to have blood transfusions to protect the unborn child.)

Although sections 3705 and 3706 of the Penal Code, which provide for suspending the execution of a pregnant woman, reflect an interest in the unborn child, the sections do not affect any other significant private interests and thus furnish no basis to evaluate the interest protected or to conclude that the embryo or fetus is equivalent to a born child.

[13]One case has held that, for purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed. (People v. Chavez, 77 Cal.App.2d 621, 624, 626.)

any interest the state may have in the unborn. The California abortion statutes, as do the abortion laws of all 51 United States jurisdictions, make an exception in favor of the life of the prospective mother. (See Stern, *Abortion: Reform and the Law, supra,* 59 J.Crim.L.C. & P.S. 84, 86-87; George, *Current Abortion Laws: Proposals & Movements for Reform* (1965) 17 W.Res.L. Rev. 366, 375.) Although there may be doubts as to whether the state's interest may ever justify requiring a woman to risk death, it is clear that the state could not forbid a woman to procure an abortion where, to a medical certainty, the result of childbirth would be death. We are also satisfied that the state may not require that degree of risk involved in respondent's definition, which would prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not. Accordingly, the definition of the statute suggested by respondent must be rejected as an invalid infringement upon the woman's constitutional rights.

Another definition of the term "necessary to preserve" is suggested by People v. Abarbanel, *supra,* 239 Cal.App.2d 31, 32, 34, where the court held that an abortion was not unlawful where the obstetrician performed the abortion based on the "possibility" of suicide. *Abarbanel* might be understood as meaning that "necessary to perserve" refers to a possibility of death different from or greater than the ordinary risk of childbirth. To so interpret "necessary to preserve" would mean that in nearly every case, if not all, a woman who wished an abortion could have one. A woman who is denied a desired lawful abortion and forced to continue an unwanted pregnancy would seem to face a greater

risk of death, because of psychological factors, than the average woman, because the average includes all those women who wish to bear the child to term. The psychological factor alone, which under *Abarbanel* is a proper consideration, would seem to be decisive. Such a construction of the statute permitting voluntary abortions would render the statute virtually meaningless. Moreover, to determine the right to an abortion solely on the basis of the dangers of childbirth without regard to the relative dangers of the abortion would be contrary to good medical practice.

Nor can the statute be made certain by reading it as "substantially or reasonably" necessary to preserve the life of the mother. In the present context those terms are not sufficiently precise and would be subject to such different interpretations as to add little or nothing to "necessary." Thus, many people may feel that an abortion is reasonably or substantially necessary to preserve life where the risk of death is double or triple the ordinary risk in childbirth. Others may believe that anything which increases the possibility of death is a substantial risk which is not to be undertaken in the absence of countervailing considerations, so that "reasonably necessary" or "substantially necessary" becomes as destructive of the statute as "possibility of death." On the other hand, there may be those who feel that there is no reasonable or substantial necessity until it is more likely than not that the pregnant woman will not survive childbirth. Although in other contexts the implication of words such as "reasonably" and "substantially" may add certainty and avoid other due process objections, in the instant situation the implication of such words would merely increase the uncertainty.

There is one suggested test which is based on a policy underlying the statute and which would serve to make the statute certain. The test is probably in accord with the legislative intent at the time the statute was adopted. The Legislature may have intended in adopting the statute that abortion was permitted when the risk of death due to the abortion was less than the risk of death in childbirth and that otherwise abortion should be denied. As we have seen, at the time of the adoption of the statute abortion was a highly dangerous procedure, and under the relative safety test abortion would be permissible only where childbirth would be even more dangerous. In light of the test and the then existing medical practice, the question whether abortion should be limited to protect the embryo or fetus may have been immaterial because any such interest would be effectuated by limiting abortions to the rare cases where they were safer than childbirth.

The suggested test would involve an application of medical principles. Medical science may be able to tell us the proper method to treat a patient to minimize the risk of death, but without resort to matters outside medical competence, it cannot tell us the circumstances in which the safest treatment should be rejected and a more dangerous treatment followed in order to protect an embryo or fetus.

The new Therapeutic Abortion Act (Health & Saf. Code, §§ 25950-25954), has adopted a test analogous to the suggested one. Under the new statute, abortion is permissible during the first 20 weeks of pregnancy by a licensed physician in an accredited hospital (Health & Saf. Code, §§ 25951, 25953) if it is determined under prescribed procedures either that "There is substantial

risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (Health & Saf. Code, §25951, subd. (c) (1)), or that "The pregnancy resulted from rape or incest." (Health and Saf. Code, § 25951, subd. (c) (2).) Mental health includes mental illness to the extent that the woman would be dangerous to herself. (Health & Saf. Code, § 25954.) By limiting the abortion to the first 20 weeks, the Legislature has taken into account the danger to the mother of the later abortion and, by requiring the abortion to be performed by a licensed physician in an accredited hospital, has recognized the danger to the mother of other procedures. The further criteria for determining whether an abortion is permissible is the pregnant woman's physical and mental health. Thus, the test established is a medical one, whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term, and the assessment does not involve considerations beyond medical competence. There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo.

Although the suggested construction of former section 274, making abortion lawful where it is safer than childbirth and unlawful where abortion is more dangerous, may have been in accord with legislative intent, the statute may not be upheld against a claim of vagueness on the basis of such a construction. The language of the statute, "unless the same is necessary to preserve her life," does not suggest a relative safety test, and no case interpreting the statute has suggested that the statute be so construed. None of the parties or numerous amici who have filed briefs in the instant case sug-

gest that the statute applies a relative safety test; to the contrary, the position of the parties and amici, including numerous lawyers, doctors, educators, clergymen and laymen, implies that the statute does not apply that standard. Thus, those claiming the statute is invalid urge that the only valid standard would be a relative safety test and that the statute fails to adopt such a test, and those urging the validity of the statute either state or imply that the standard applied is more restrictive. In the circumstances, we are satisfied that the statute may not be construed to adopt the relative safety test as against a claim of vagueness, because the language does not suggest that test and because of the practical evidence before us that men of "common" intelligence, indeed of uncommon intelligence, have not guessed at this meaning.[14]

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[14]The practical aspects of the need to guess at the meaning of the abortion statute is shown by Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine* (1959) 11 Stan. L. Rev. 417. A questionnaire survey directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.*, at p. 423) based on hypothetical cases involving pregnant women seeking abortions yielded the following results (*id.*, at p. 444):

Case No.	Authors' Evaluation of Legality of Abortion	Hospital Would Perform Abortion	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Prob. Yes	10	11
10	Maybe	17	4
11	No	1	20

The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion and the physician acts at his peril if he determines that the woman is entitled to an abortion. He is subject to prosecution for a felony and to deprivation of his right to practice medicine (Bus. & Prof. Code, § 2377) if his decision is wrong. Rather than being impartial, the physician has a "direct, personal, substantial, pecuniary interest in reaching a conclusion" that the woman should not have an abortion. The delegation of decision-making power to a directly involved individual violates the Fourteenth Amendment. (Tumey v. Ohio (1927) 273 U.S. 510, 523; see also State Board v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 448 ["[T]he statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule. . . ."]; Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 235.)

The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition of section 274 of the Penal Code, she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed.

The pressures on a physician to decide not to perform an absolutely necessary abortion are, under section 274 of the Penal Code, enormous, and because section 274 authorizes—and requires—the doctor to decide, at his

peril, whether an abortion is necessary, a woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions.

To some extent the Therapeutic Abortion Act reduces these pressures. The act specifically authorizes an abortion by a licensed physician in an accredited hospital where the abortion is approved in advance by a committee of the medical staff of the hospital, applying medical standards. (Health & Saf. Code, § 25951.) At least in cases where there has been adherence to the procedural requirements of the statute, physicians may not be held criminally responsible, and a jury may not subsequently determine that the abortion was not authorized by statute.

We conclude that the validity of section 274 of the Penal Code before amendment cannot be sustained.[15]

Since section 274 is invalid, Dr. Belous' conviction for violation of section 182 of the Penal Code, conspiracy to commit abortion, must likewise fall. The judgment is reversed with directions to the trial court to dismiss the indictment.

Peters, *J.*

We Concur:

Traynor, *C. J.*

Tobriner, *J.*

*Pierce, *J. Pro Tem.*

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[15]It has been urged that the Therapeutic Abortion Act is unconstitutional because it contains uncertainties similar to those in the repealed statute, because it infringes on the woman's right to choose whether to bear children, and because the act does not expressly permit an abortion where there is a likelihood that a deformed child will be born. Since the act was adopted after the abortion in the instant case, we do not reach the issue of its validity.

*Assigned by the Chairman of the Judicial Council.

Dissenting Opinion by Burke, J.

I dissent.

The defendant was found guilty by jury trial of a wilful violation of the abortion statute as it existed at the time of the offense. That he violated the statute is all but conceded in the briefs filed in his behalf. Although he testified that he directed the young couple to a doctor, unlicensed in California, because he believed that if they carried out their threats of going to Tijuana to procure an abortion the young woman's life would be in danger, he acknowledged upon cross-examination that her life would not have been endangered if she were not aborted. His assertions that he acted in good faith and out of compassion are tainted somewhat by the evidence which showed that he had referred other women to the same unlicensed physician on a number of occasions and that he had participated on at least one-half of those occasions in the fee paid the abortionist.

Had the doctor truly believed that the young woman's life was in danger he could have done what was the common practice of taking the patient to one of the several hospitals in which therapeutic abortions were being performed. To my knowledge there is not one single instance of a decision of the appellate courts of this state in which a doctor or a hospital has been prosecuted for the performance of an abortion where an independent hospital committee deemed the abortion to be necessary to preserve the woman's life. The plain fact is, as the jury found it to be, that this doctor, whatever his motive, possessed the intent to assist in procuring the miscarriage of the woman for reasons other than to preserve her life. This is the specific intent which the law requires for conviction.

He supplied to the jury the answer an independent hospital committee undoubtedly would have given him had he seen fit to seek its approval for an abortion—the patient could bear the child without endangering her life; therefore, to abort her would violate the law.

The threatened danger to the woman's life arose only from the couple's assertions that they would seek an illegal abortion by an unlicensed person. To assist them in attaining this goal was to flaunt his profession's own standards and to aid in bringing about a direct violation of the law.

The majority would reverse the conviction by declaring the statute unconstitutional because of asserted uncertainty in the phrase, "necessary to preserve [the woman's] life."[1] This phrase has been an integral part of the California law against illegal abortions from the time of its enactment in 1872 until the 1967 amendment to the section, and similar language was in the original statute adopted in 1850.[2] Thus for over a hundred years in this state doctors, hospital committees, judges, lawyers and juries have been called upon to give the phrase the common sense interpretation which the words appear to me to suggest. For this court over a hundred years later to find the language unconstitu-

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[1]Section 274 then read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is *necessary to preserve her life*, is punishable. . . ." (Italics added.)

[2]The 1850 statute (ch. 99, § 45, p. 233) provided that every person who did any of the enumerated acts with a specified intent shall be punishable "*Provided*, that no physician shall be affected . . . who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

tionally vague and uncertain is a "negation of experience and common sense." (*United States v. Ragen,* 314 U.S. 513, 524.)

Not only was the phrase long used in the California statute, it was also employed at common law (see, e.g., Perkins on Criminal Law (2d ed.) p. 145; Clark and Marshall, Crimes (6th ed.) pp. 688-689) and is or has been in the abortion statutes of many states (see, e.g., Am. Jur.2d, Abortion, § 9, p. 192; 153 A.L.R. 1218, 1266; Smith, Abortion and the Law (1967) p. 7). Implicit in the decisions of this court, as well as those of countless other courts, is the view that the phrase does not render such a statute invalid (see, e.g., *People v. Davis,* 43 Cal.2d 661; *People v. Gallardo,* 41 Cal.2d 57; *People v. Powell,* 34 Cal.2d 196; *People v. Wilson,* 25 Cal.2d 341; *People v. Rankin,* 10 Cal.2d 198). In *State v. Moretti* (N.J.) 244 A.2d 499, 504 [cert. den. 393 U.S. 952] the court stated that when the phrase "lawful justification," as used in a statute prohibiting abortions done maliciously or without lawful justification, is confined "to the preservation of the mother's life," the statute is not subject to constitutional attack on the ground of vagueness. (See also *State v. Elliott* (Ore.), 383 P.2d 382, 384-385.)

The proper test as to certainty was stated by this court in *People v. Howard,* 70 A.C. 659, 665, to be: "'A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in *Pacific Coast Dairy v. Police Court,* 214 Cal. 668, at page 676 . . . "Mere difficulty in ascertaining its

meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." [Citations.]' "

The meaning of the phrase "necessary to preserve [the woman's] life" was considered in *People v. Ballard,* 167 Cal.App.2d 803, 814-815, wherein the Court stated, "Surely, the abortion statute (Pen. Code, § 274) does not mean by [this phrase] that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' (*State v. Dunklebarger,* 206 Iowa 971 [221 N.W. 592, 596]; see also *Rex v. Bourne,* 1 K.B. 687 . . .; *Commonwealth v. Wheeler,* 315 Mass. 294 [53 N.E.2d 4]; 23 So.Cal. L.Rev. 523.) In *State v. Powers* . . . 155 Wash. 63, 67 [283 P. 439, 440], the court satisfied itself with an interpretation of 'necessity to save life' by stating, *'if the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community . . . then it cannot be said that the operation was not necessary to preserve the life of the patient.'* " (Italics added.) See also *People v. Abarbanel,* 239 Cal.App.2d 31, 34; *People v. Ballard,* 218 Cal.App. 2d 295, 307.)

Amici for appellant, 178 deans of medical schools, state that the italicized sentence quoted from *People v. Ballard, supra,* 167 Cal.App.2d 803, 814-815, is in error because "the medical profession has 'approved'

abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. . . ." However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

The word "preserve" is defined in the dictionary as "1. To keep or save from injury or destruction; . . . to protect; save. 2. To keep in existence or intact; . . . To save from decomposition. . . ." (See Webster's New Internat. Dict. (3d ed. 1961).) As used in section 274, the word "preserve" has been regarded as synonomous with "save" (see, e.g., *People v. Kutz,* 187 Cal.App.2d 431, 436; *People v. Malone,* 82 Cal.App.2d 54, 59; *Stern v. Superior Court,* 78 Cal.App.2d 9, 18), and to save a life ordinarily is understood as meaning to save from destruction, i.e. dying—not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under section 274. (See Packer and Gampell, *Therapeutic Abortion: A Problem in Law and Medicine,* 11 Stan. L.Rev. 417, 433, 436.)

That the Legislature used the word "preserve" in the sense of save from destruction also appears from the purpose of the section. The law historically in various contexts has regarded the unborn child as a human being. (See Louisell, *Abortion, The Practice of Medicine, and the Due Process of Law,* 16 U.C.L.A. L. Rev. 233, 234-244.) Louisell (at p. 244) quotes from Prosser on Torts (3d ed. 1964) that "[M]edical authority has recognized long since that the child is in ex-

istence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. . . . All writers who have discussed the problem have joined . . . in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother." In *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson* (N.J.) 201 A. 2d 537, 538 [cert. den. 377 U.S. 985] it was held that an unborn child of a woman who did not wish blood transfusions because they were contrary to her religious convictions was entitled to the law's protection and that an order would be made to insure such transfusions to the mother in the event they are necessary in the opinion of the attending physician.

Several statutes show that the California law has been in accord in regarding the unborn child as a human being for various purposes. (See, e.g., Pen. Code, §§ 3706 and 270; Civ. Code, § 29.)[3] In *Scott v. McPheeters*, 33 Cal.App.2d 629, 634, the court declared: "The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being

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[3]Penal Code section 3706 requires that the execution of a death penalty be suspended if the defendant is pregnant and without regard to the stage of pregnancy.

Penal Code section 270 makes punishable a father's wilful failure to provide a minor child with necessary items and provides that "A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."

Civil Code section 29 provides in part that "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth. . . ."

separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding."

It is reasonable to believe that section 274, as it read at the time in question, was not an exception to the law's attitude respecting the unborn child as a human being and that it was designed to protect not only the mother's life but also that of the child. In view of that purpose it would appear that the Legislature intended that the child would be deprived of his right to life only if in the absence of an abortion there was a danger of the mother's death—not merely of injury to her.

"'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States v. Petrillo,* 332 U.S. 1, 7-8." (*Roth v. United States,* 354 U.S. 476, 491.) The phrase in question, when applied according to the standard heretofore stated (namely, whether persons reasonably skilled in their profession practicing in the same community recognized and approved the act as being required to save the patient from dying) clearly gives such warning.

Furthermore, section 274 punishes only those who act with "'. . . the intent to commit a criminal abortion, that is, an abortion for a purpose other than to preserve [i.e. save from destruction] the life of the mother.'" (*People v. Abarbanel, supra,* 239 Cal.App.2d 31, 34-35; *People v. Ballard, supra,* 167 Cal.App.2d 803, 817.)

The requirement of such an intent eviscerates much of the majority's claim that the section is impermissibly vague. (See generally *Mishkin v. New York,* 383 U.S. 502, 507, fn. 5; *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 342.) A person who performs an abortion with such an intent has fair warning that his conduct may violate the law even though he may not be certain where the jury will draw the line on the matter of necessity.

The principal cases relied upon by the majority, in which statutes have been declared unconstitutionally vague, do not support such a finding when applied to the abortion statute. In *People v. McCaughan,* 49 Cal. 2d 409, the statute prohibited, among other conduct, "harsh" or "unkind" treatment of a mentally ill person. These words were held not to have an established meaning either at common law or as a result of adjudication. They were held unconstitutionally vague. On the other hand, the phrase "neglect of duty" and the word "cruel" were upheld because they did have such well established meanings, just as do the words utilized in the phrase under attack here.

Lanzetta v. New Jersey, 306 U.S. 451, 453, construed a statute defining "gangster" and making it a crime for anyone to be such a person. The phrase "consisting of two or more persons" was all that purported to define "gang," and the word "gang" was held so vague and uncertain as to violate the Fourteenth Amendment.

Connally v. General Const. Co., 269 U.S. 385, 395, involved a statute requiring a contractor to pay his employees "not less than the *current rate of . . . wages* in the *locality* where the work is performed," and the court held the italicized words unconstitutionally vague. Un-

like the statute involved here, the statute in question was a new statute and the court noted that its application "depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition. . . ."

In contrast to these cases, here the challenged statute has a fixed meaning, frequently applied and impliedly interpreted by the courts in the more than one hundred years of its existence. In addition, the statute requires proof of the specific intent to commit a criminal abortion before a person may be successfully prosecuted under it.

There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional. (*In re Anderson*, 69 Cal.2d 613, 628.)

The majority cite no authority holding that the term "necessary to preserve [the woman's] life" is impermissibly vague, and I agree with the conclusion as to the constitutionality of the section that is implicit in the multitude of past decisions affirming convictions for illegal abortion, and for murder where death was the result of such an act.

I would affirm the judgment.

Burke, *J.*

We Concur:
McComb, *J.*
Sullivan, *J.*

Dissenting Opinion by Sullivan, J.

I concur in the views of Justice Burke. Reading the majority's attack on Penal Code section 274, one would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. The majority strike down the statute solely because they find so vague and uncertain as to offend constitutional standards of due process, a single brief clause of nine words of long and common usage: "unless the same is necessary to preserve her life." There is no mystique enveloping the statute and, as Justice Burke points out, the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it.

The mandate of the section is plain and clear, and simply means this: no one shall intentionally procure the miscarriage of a woman unless it is necessary to save her life. "The criminal intent necessary to support a conviction of illegal abortion must show that it was performed for a purpose other than to save the abortee's life." (People v. Abarbanel (1965) 239 Cal.App.2d 31, 34). I dare say that the average man in the street, confronted with this law, would have little trouble in extracting its sense (we hold him accountable to much more complicated enactments); and the doctor, with his professional training and expertise would have even less.

We have said that "[i]t is a cardinal rule to be applied to the interpretation of particular words, phrases, or clauses in a statute or a constitution that the entire substance of the instrument or of that portion thereof which has relation to the subject under review should be looked to in order to determine the scope and purpose of the particular provision therein of which such words, phrases, or clauses form a part; and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear." (Wallace v. Payne (1925) 197 Cal. 539, 544.) In the case before us, the challenged clause when so examined, is clear in meaning.

Yet the majority, by engaging in a process of elaborate and lavish analysis, transform that which is simple and lucid into something complex and arcane. Actually the analysis is focused on only three words: "necessary to preserve." Their fair equivalent is "necessary to save" (see People v. Abarbanel, *supra,* 239 Cal.App.2d 31, 34; People v. Ballard (1959) 167 Cal.App.2d 803, 814, 817). Rather than evaluate these words in the light of "the entire substance" (see Wallace v. Payne, *supra,* 197 Cal. 539, 544), the majority resort to a dissection: "There is, of course, no standard definition of 'necessary to preserve' and taking the words separately, no clear meaning emerges." (Mimeo opn., p. 8.) In support of this thesis, it is asserted that the word "necessary" does not have a "fixed meaning." In general, few

words do.[1] It is further insisted that the definition of "preserve" is "even less enlightening." Accordingly, the majority discard its obvious meaning, that is, "save," as used in the context "to save a life." From such analysis, the opinion concludes "that the term 'necessary to preserve' in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights." (Mimeo opn., p. 7.) Actually the gist of this is that the three words "necessary to preserve" are so shrouded in darkness that the average man cannot detect what they mean although average men and women above average have had no trouble with them for a hundred years.

I cannot accept so tortured a conclusion, wrenched from a statute which has had its roots in the law's historic solicitude for the priceless gift of life. The statute

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[1]"Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, . . .' (*Pearson v. State Social Welfare Board* (1960) 54 Cal.2d 184, 195 [5 Cal. Rptr. 553, 353 P.2d 33].) The meaning of particular words or groups of words varies with the '. . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, *The Interpretation of Words and the Parole Evidence Rule* (1965) 50 Cornell L.Q. 161, 187.)" (Pacific Gas & E. Co. v. G.W. Thomas Drayage Etc. Co. (1968) 69 Cal.2d 33, 38.)

"Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." (Universal Sales Corp. v. Cal. etc. Mfg. Co. (1942) 20 Cal.2d 751, 776, Traynor, J. concurring.)

plainly prohibits an abortion unless it is necessary to save the mother's life. It strains reason to say that this crystal-clear exception to the law is "so vague that men of common intelligence must necessarily guess at its meaning. . . ." (Lanzetta v. New Jersey (1939) 306 U.S. 451, 453—see mimeo opn., p. 7.) And it strains credulity to assume that this defendant, who under the evidence wilfully violated the statute, had to engage in any such guesswork with respect to the law governing his conduct.

I would affirm the judgment.

Sullivan, *J.*

I Concur:

McComb, *J.*

APPENDIX "B".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

The People, Plaintiff and Respondent, vs. Leon Phillip Belous, Defendant and Appellant. 2d Crim. No. 13618.

Filed August 13, 1968.

APPEAL from order of the Superior Court of Los Angeles County. John G. Barnes, Judge. Affirmed.

For Appellant: Zad Leavy.

For Respondent: Thomas C. Lynch, Attorney General; William E. James, Assistant Attorney General; Phillip G. Samovar, Deputy Attorney General.

This is an appeal from an order granting probation following a jury verdict that appellant was guilty of the felonies of conspiracy to commit an abortion upon Cheryl Bryant and of aborting Cheryl Bryant (Pen. Code, §182(1), former Pen. Code, §274.)[1] The appeal lies. (Pen. Code, §1237(1).)

The grounds of appeal are alleged errors in the admission of exhibits and the giving of instructions, and the contention that former Penal Code, section 274 was unconstitutional.

I. THE FACTS

In the summer of 1965, appellant, an eminent, boarded Beverly Hills specialist in gynecology and obstetrics and a leading and widely known advocate of abortion

[1]Appellant was convicted under Penal Code, section 274 as it existed before it was rewritten in 1967. At that time the previous statutory exception "unless the same is necessary to preserve her life" was reworded to refer to the Therapeutic Abortion Act found in Health & Safety Code, sections 25950 et seq.

law reform in California, spent 3 or 4 days in Tijuana, Mexico, observing how abortions were performed there. During this visit he met his co-defendant Carl Lairtus[2] and saw him perform 3 abortions very competently. Thereafter appellant began referring "absolutely desperate patients"[3] to Lairtus, who lived in Chula Vista, California, for Tijuana abortions. Toward the end of 1965 the Mexican authorities generally stopped the performance of abortions in Tijuana as these operations were likewise illegal in Mexico, and Lairtus rented an apartment under the name of Jack Grossman at 1525 North Kenmore in Los Angeles for the purpose of performing abortions there. He informed appellant almost immediately of this change of location. Appellant continued to refer his absolutely desperate patients to Lairtus for abortions at Lairtus' new location and in about half of the cases, purely as a professional courtesy and with no request from appellant, Lairtus paid appellant one hundred dollars out of the fees which he received for performing abortions upon appellant's patients. Appellant never refused this money.

Early in 1966 Cheryl Bryant and her fiance, Clifton Palmer,[4] who were both attending California State at Los Angeles, saw appellant on the Louis Lomax television show campaigning to liberalize the California abortion laws. In early April of that year, Cheryl

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[2]Lairtus was a licensed physician in Mexico but he was unlicensed in California. He sought appellant's help in obtaining a license to practice medicine in California.

[3]Appellant defined "absolutely desperate patients" as those women who he was convinced were either going to attempt self-induced miscarriages or a Tijuana abortion regardless of the great risk involved to their lives in either course of action.

[4]At the date of trial of this case, in January 1967, Cheryl and Clifton had been married for 4 months.

missed her menstrual period and decided that she might be pregnant with an unwanted baby. On April 8 she went to a private physician who provided her with some pills through the use of which she could bring on her period if she were not pregnant. She took the pills. Nothing happened. Within a week or so Palmer phoned appellant for Cheryl and made a professional appointment for them at appellant's office in Beverly Hills on April 25th.

This appointment lasted about three-quarters of an hour. During this time appellant examined Cheryl professionally and confirmed that she was probably pregnant. The two young people asked appellant to abort Cheryl. Appellant refused, and having ascertained that they were engaged, urged them to marry and to allow her pregnancy to run its normal course. They refused and told him that if he would not abort her they would get it done in Tijuana. He warned them at length of the very serious and grave dangers to Cheryl's life in following such a course of action. The meeting became a very emotional one and at this point Cheryl started crying and pretty soon all three were crying. Finally appellant became convinced that Cheryl was going to get an abortion, probably in Tijuana, regardless of the great risk to her life in doing so and he then prepared and handed her a slip of paper (Peo. Ex. 1) with Lairtus' Chula Vista telephone number on it, and a prescription for some antibiotic pills. He told them that the price of the abortion would be about $500, they could use his name if it would help them get it, and directed Cheryl to return to him in three weeks for a check-up.

Cheryl and Palmer then raised the $500, phoned Lairtus and made an appointment to have the abortion performed by him at 12:00 noon on May 10, at apartment No. 305, 1525 North Kenmore, and had the prescription filled. Lairtus performed the abortion on Cheryl at the time and place scheduled for $500, paid to him in small bills by Palmer, after first ascertaining, as he always did from his patients, who had referred her to him.

Meanwhile, on May 5th, the Los Angeles police, homicide division, abortion detail, had learned in requested interviews with one Lois Berman and her friend Timothy Harrington, that quite recently one Jack Grossman had performed an abortion upon Lois for $500 at apartment No. 305, 1525 North Kenmore.[5] Later that day Harrington directed three experienced officers of this detail to this location, where they checked the exterior of the apartment, the name of its mail box and its parking stall. A couple of days later one of these officers checked the location again but found no appearance of activity in the apartment.

On May 10, three officers in plain clothes established a stakeout of the apartment house. They waited until one of them saw a man, corresponding to the description Lois Berman and Harrington had given of Jack Grossman, enter the elevator on the main floor. They then proceeded to the third floor of the building and waited near the front door of the apartment until about 1:00 p.m. At this time a young couple came up to the door of the apartment, rang the bell and were admitted. The

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[5]Kaiser Hospital personnel had reported to the police on May 4th, as is required by Penal Code, sections 11160-11162, 36 Ops. Cal. Atty. Gen. 200, that a possible criminal abortion had been performed upon Lois Berman who had come there for a post-operative check-up.

three police officers followed the couple through the open door where they were met by Lairtus who invited them in. One of the officers identified himself at once to Lairtus and asked him if he was Jack Grossman. Upon receiving an affirmative reply the officers arrested Lairtus for abortion.

The officers immediately made a weapons search of Lairtus' person and found two appointment books. (Peo. Exs. 6 & 7.) They examined these books and found appellant's name in them at least 13 times as the referring doctor of a number of patients, including Cheryl Bryant. They then searched the apartment and in the bedroom, which was fully equipped for the performance of abortions, found Cheryl Bryant resting. Lairtus had apparently just completed an abortion upon her. They took her to a hospital and then to her private physician for her protection and to confirm this fact.

They then went directly to appellant's office in Beverly Hills where they arrived at about 4:20 p.m. One of the officers identified himself to appellant and immediately placed appellant under arrest for abortion. Appellant produced from his wallet a slip of paper in Lairtus' handwriting which Lairtus had evidently given appellant. This slip of paper (Peo. Ex. 9) had on it, among other things, Lairtus' Chula Vista telephone number and his Kenmore apartment address in Grossman's name. An officer then demanded and received, with appellant's reluctant cooperation, appellant's office chart on Cheryl Bryant. (Peo. Ex. 8.) A warrantless search by the officers over appellant's objection of his private office revealed in the top drawer of his desk two more slips of paper in his handwriting bearing Lairtus' Chula Vista telephone number. (Peo. Exs. 10, 11.)

II. ANALYSIS OF APPELLANT'S CONTENTIONS

Appellant contends that People's Exhibits 6, 7, 8, 9, 10 and 11 were obtained from the person and premises of Lairtus and himself by unreasonable searches and seizures and were therefore improperly admitted in evidence. They were all obtained without either arrest warrants or search warrants; by means of searches incidental to the arrest of Lairtus and appellant for the abortions respectively of Lois Berman and Cheryl Bryant. Consequently, if probable cause existed for the arrest of each of these men and the manner of effectuating their respective arrests was proper, these People's exhibits were properly admitted in evidence.

We believe that probable cause existed for the arrest of Lairtus on May 10, 1966. On May 4th Kaiser Hospital personnel reported to the police that a possible criminal abortion had been performed on Lois Berman. On May 5th the police were informed by Lois Berman and Timothy Harrington that one Jack Grossman had performed a criminal abortion on her in apartment No. 305 at 1525 North Kenmore.[6] The police checked out this location twice between May 5th and May 10th and found that the apartment at this address, according to its mail box, was apparently occupied by one Jack Grossman. This on-the-spot investigation and their later observation of a man entering the elevator of the

[6]Appellant points out that both of these individuals were guilty of felonies in connection with her abortion, (see former Pen. Code, §§ 274, 275, 276) and that neither was advised of his or her constitutional rights before giving this information to the police. These claimed violations of their constitutional rights, however, do not bar the introduction of People's Exhibits 6 and 7 since that evidence was not introduced against either of them but against appellant. (See *People v. Varnum*, 66 Cal.2d 808, 812-813.)

building corresponding to the description they had of Jack Grossman verified in these respects the accuracy of the information they had previously received from Lois and Harrington. Thus when the police entered Lairtus' apartment on May 10th and placed him under arrest for abortion upon his admitting that he was Jack Grossman, they had reliable information that he had committed a criminal abortion on Lois Berman in this apartment earlier. Therefore there was probable cause for his arrest at that time. (*People v. Talley,* 65 Cal.2d 830, 835-836; *People v. Lara,* 67 A.C. 367, 376.)

We likewise find no violation of Penal Code, section 844 in the manner of the officers' entry into Lairtus' apartment for the purpose of arresting him. Section 844 explicitly applies only to those situations where an officer breaks open a door or window of a house for this purpose and under *People v. Rosales,* 68 A.C. 307, 311, "breaking" would seem to require at least the opening of an unlatched door. (See also *Sabbath v. United States,* 36 U.S.L.W. 4502, 4503, fn. 5, fn. 7.) Here the door to the apartment was open when the officers entered in order to arrest Lairtus, who, upon seeing them, and without ascertaining who they were, invited them in.

Turning to appellant's arrest situation, we also conclude that probable cause existed for his arrest for abortion on May 10th. To constitute such cause, facts must be known to the arresting officer which would lead him, as a man of ordinary care and prudence, to entertain a strong suspicion that the person arrested is guilty of a felony. (See *People v. Hillery,* 65 Cal.2d 795, 803.) At the time of appellant's arrest the officers were in possession of facts leading them to believe rea-

sonably that Lairtus had performed an abortion upon Cheryl Bryant earlier that day and that she had been referred to Lairtus for this abortion by appellant. We refer to the evidence showing that Cheryl Bryant had been aborted that day, in all probability by Lairtus, and to Lairtus' appointment book showing appellant's name as the referring doctor for Cheryl.

Appellant next complains of the exclusion from evidence of his proffered Exhibit A for identification, a pamphlet of the California Committee for Therapeutic Abortion entitled "The Truth About Abortion, Must 1000 Women Die This Year?" The contents of the pamphlet clearly constituted hearsay (Evid. Code, §1200) and thus the pamphlet was properly excluded on this basis alone. (See Witkin, Cal. Evid. (2d ed. 1966) §1304, p. 1206.)

We come now to the heart of this appeal—the refusal by the trial court to give the following instruction requested by appellant: "Penal Code, section 274 does not mean by the words 'unless the same is necessary to preserve her life' that peril to life be imminent. It is enough that the dangerous condition be potentially present, although its full development might be delayed to a greater or less extent, and it is not essential that the person performing the abortion believe that the death of the patient would be otherwise certain in order to justify him in affording present relief." This requested instruction was based upon certain language found in *People v. Ballard,* 167 Cal.App.2d 803, 814, hear. den.

The court instead gave CALJIC No. 591 as requested by the People. This instruction included the exact language of former Penal Code, section 274, defining the crime of abortion and such language expressly ex-

cepted an intentional miscarriage or abortion of a woman an "when necessary to preserve her life." Apparently the fundamental theory of defense in this case, but one not articulated in argument to the jury, was that the abortion performed on Cheryl Bryant by Lairtus was a legal one because necessary to preserve her life in the sense that she would have otherwise undergone an illegal abortion which would have probably seriously endangered her life. But at the time of her abortion Cheryl, by her own admission, was in good health physically; she simply desired to terminate her pregnancy. Appellant, in his professional examination of her, found nothing physically wrong with her. Her only medical problem was her mental and emotional attitude toward her pregnancy. He did not believe that allowing her pregnancy to go to term would in itself endanger her life; it was just that he could not tell to what desperate measures, dangerous to her life, she might resort in order to terminate her unwanted pregnancy.

We do not see how, in the light of the evidence presented in this case by appellant, his rejected instruction states the statutory exception of the necessity to preserve the mother's life significantly more favorably to his defense theory than CALJIC No. 591 did. It is true that the rejected instruction emphasized, as CALJIC No. 591 did not, that the peril to the mother's life did not have to be imminent and that the person performing the abortion would not have to believe that the mother's death would be certain unless the abortion were performed. But neither instruction embodied appellant's fundamental but inarticulated theory that the statutory exception of the necessity to preserve the

mother's life refers, not to the necessity of terminating her pregnancy but instead to the necessity that the abortion performed upon her be a safe one without danger to her life. We have found no legal authority for appellant's construction of the statutory exception and he has cited us none. We believe it to be a plain misreading of the statutory exception.

Appellant next contends that the judgment of conviction should be reversed because both before and during the jury's deliberations the trial court gave to the jury certain extemporaneous instructions upon conspiracy which appellant claims were both confusing and prejudicial. At the time the court originally instructed the jury on the law, it gave the following CALJIC instructions relating to conspiracy: Slightly modified No. 932, revised (joint responsibility of conspirators), No. 931, revised (defining conspiracy), No. 933 (proof of conspiracy by circumstantial evidence), No. 934 (express agreement unnecessary) and No. 938 (necessity of proof of an overt act). Between giving Nos. 931 and 933 the trial court told the jury extemporaneously of the three overt acts charged in the information and that at least one of these overt acts had to be established by the People. Furthermore, after reading No. 938, the trial court extemporaneously gave the following instruction set forth in footnote[7] below.

---

[7]"I can give you an illustration of that sort of thing. Suppose A and B and C get together one day and they say, 'Let's rob the First National Bank.' And one of them said, 'Well, we're going to need a machinegun to do this job and do it right.' And they all agree that they are going to do that job and get a machinegun. One of them says, 'I know where I can get one. Give me that phone.' He reaches over and he picks up the telephone, and hasn't dialed yet, but he's going to dial. He's started

(This footnote is continued on the next page)

The jury was out all one afternoon and returned to the courtroom the next morning after deliberating less than one hour. At that time it requested to hear further instructions on the matter of the overt act of the conspiracy." The court replied as follows: "An overt act is an act done for the purpose of furthering the conspiracy. It can be any kind of an act so long as it is for that purpose. It need not in itself be a criminal act," and then at the jury's request, reread the three overt acts alleged in the information. Since the jury had indicated it wanted the "instructions on conspiracy" reread, the court then inquired whether the jurors wanted the matter of conspiracy defined and upon being told by the foreman that they would, the court instructed the jury extemporaneously as follows: "A conspiracy is an agreement between two or more persons to do a criminal act. There need be no formal setting up of the agreement. The agreement can be passed. It amounts to a criminal partnership. The parties to the agreement, however many there may be, may share equally in the product of the agreement, or may not share at all. In a way it's like a contract. Each of you, every day or so of your lives, have agreements with other people, and the conduct of the parties demonstrates what the agreement is without any specific words being spoken.

"I will give you an example of it. You walk into your neighborhood grocery store. You walk around, you pick up a can of coffee. You take the can of coffee to

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the procedure for the use of the telephone. When he's done that, that's an overt act in furtherance of the conspiracy. And by itself it means nothing from a criminal standpoint; that is to say there's nothing wrong in any respect in picking up a telephone for the purpose of using it. But under the law of California, the crime is complete then. And if, at that moment, the police were to walk in, that would be sufficient."

the cashier. You lay down a dollar bill. The price of the coffee is marked on the can. You say 'Good morning, Joe, how's the family this morning?' Joe, the cashier, says, 'Oh, everything is fine with us. How's that new grandson of yours?' And he picks up your dollar bill, he rings it, and he gives you your change. He says, 'Thanks. Well, see you later.' You have had an agreement, yet not one word has been spoken about 'Ill buy this can of coffee from you,' nor has the merchant said to you, 'I'll sell you the can of coffee.' There's an understanding. The conduct of the parties indicates that there has been mental communication. In other words, there's a passed agreement to buy and sell a can of coffee. And so it is with any kind of an agreement. And in conspiracy, it is the meeting of the minds upon a joint criminal enterprise, between two or more persons, to accomplish that act." The jury then returned to its deliberations.

At 11:10 a.m. the jury returned to the courtroom, again at its request, for a rereading of the previously mentioned instruction, CALJIC No. 932 revised.

The trial judge is expressly authorized by statute "without any request from either party" to give to the jury "such instructions on the law applicable to the case as he may deem necessary for their guidance on hearing the case." (Pen. Code, §1093(6).) We do not find that the law as to conspiracy was stated incorrectly or unfairly in the extemporaneous instructions; they were obviously given in an effort to make the content of an unfamiliar legal concept clear to a group of laymen by relating that concept illustratively to factual situations which were more familiar to them.

Finally, with respect to the instructions given by the trial court, appellant claims that "the trial court failed in its duty to instruct on the specific intent required for conspiracy and for abortion." This claim is without merit. Appellant did not request any instruction upon the question of intent except the *Ballard* instruction which we have previously quoted. The previously mentioned CALJIC No. 591 expressly stated the specific intent required for the crime of abortion and the instructions upon conspiracy which we have also previously mentioned adequately informed the jury regarding the "agreement to commit a crime" which the People had to prove in this case in order to establish a criminal conspiracy between appellant and Lairtus to commit the crime of abortion upon Cheryl Bryant. (See *People v. Marsh,* 58 Cal.2d 732, 743-744; *People v. Seter,* 216 Cal.App. 2d 238, 247, hear. den.)

In conclusion, we turn to appellant's final contention that former Penal Code, section 274, under which he was convicted, was unconstitutional. As we understand his arguments, in essence he claims that the former statute violated the constitutional right of privacy of Cheryl Bryant and her then fiance, Clifton Palmer, and of appellant as their physician, and that in addition it was unconstitutionally vague and uncertain with respect to which abortions are considered criminal.

It is true that in *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed. 2d 510, the United States Supreme Court held that a couple's constitutional right of marital privacy was violated by state statutes forbidding the use of contraceptive devices. But this constitutional right of privacy extends only to married couples and at the

time of Cheryl Bryant's abortion she was not married to Clifton Palmer.

We do not believe that former section 274 was unconstitutionally vague and uncertain in the aspect challenged. Appellant bases most of his argument on this point on the increased specificity which has resulted from the passage about a year ago of the previously mentioned Therapeutic Abortion Act (Health & Saf. Code, §§ 25950 et seq.) and the tying in of the criminal abortion statutes to that act. But this merely proves that the criminal abortion statutes have been changed; it does not prove that the former version of the statutory exception involved in this case, which operated for some 95 years without any noticeable difficulty or challenge, was constitutionally defective in clarity. To us, the former statutory exception was clear in its meaning which was that an intentional miscarriage was not a criminal abortion when the termination of a pregnancy was necessary to preserve the life of the mother. (See *People v. Gallardo,* 41 Cal.2d 57, 62.)

The order, which constitutes the judgment for purposes of appeal, is affirmed.

Cobey, *J.*

We concur:

Ford, *P. J.*

Moss, *J.*

APPENDIX "C".

California Penal Code section 274.

§ 274. [*Providing or administering drug or employing means to procure miscarriage: Punishment.*] Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.

United States Constitution, Fourteenth Amendment, Section 1.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D."

California Penal Code section 274.

§ 274. *Supplying or administering abortifacient; exception; punishment*

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, * * * except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years.

(As amended Stats. 1967, c. 327, p. 1523, § 3.)

§25950. *Citation of Chapter.*

This Chapter shall be known and may be cited as the Therapeutic Abortion Act. [Added by Stats. 1967, Ch. 327 §1.]

§ 25951. *Conditions for performing abortion: Hospitalization of patient: Approval by committee: Impairment of physical or mental health: Rape: Incest.*

A holder of the physician's and surgeon's certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion, only if each of the following requirements is met:

(a) The abortion takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals.

(b) The abortion is approved in advance by a committee of the medical staff of the hospital

which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals. In any case in which the committee of the medical staff consists of no more than three licensed physicians and surgeons, the unanimous consent of all committee members shall be required in order to approve the abortion.

(c) The Committee of the Medical Staff finds that one or more of the following conditions exist:

(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother:

(2) The pregnancy resulted from rape or incest. [Added by Stats. 1967 ch. 327 § 1.]

§ 25952. *Rape or incest: Application for abortion: Notice: Affidavit: Duties of district attorney; Probable cause: Petition to superior court: Hearing: Evidence: Findings: Closed hearing: Admissibility of testimony in other proceedings: Age of mother: Perjury prosecution.*

The Committee of the Medical Staff shall not approve the performance of an abortion on the ground that the pregnancy resulted from rape or incest except in accordance with the following procedure:

(a) Upon receipt of an application for an abortion on the grounds that the pregnancy resulted from rape or incest, the committee shall immediately notify the district attorney of the county in which the alleged rape or incest occurred of the application, and transmit to the district attorney the

affidavit of the applicant attesting to the facts establishing the alleged rape or incest. If the district attorney informs the committee that there is probable cause to believe that the pregnancy resulted from a violation of Section 261 or Section 285 of the Penal Code, the committee may approve the abortion. If, within five days after the committee has notified the district attorney of the application, the committee does not receive a reply from the district attorney, it may approve the abortion. If the district attorney informs the committee that there is no probable cause to believe the alleged violation did occur, the committee shall not approve the abortion, except as provided in subdivision (b) of this section;

(b) If the district attorney informs the committee that there is no probable cause to believe the alleged violation did occur, the person who applied for the abortion may petition the superior court of the county in which the alleged rape or incest occurred, to determine whether the pregnancy resulted from a violation of Section 261 or Section 285 of the Penal Code. Hearing on the petition shall be set for a date no later than one week after the date of filing of the petition.

The district attorney shall file an affidavit with the court stating the reasons for his conclusion that the alleged violation did not occur, and this affidavit shall be received in evidence. The district attorney may appear at the hearing to offer further evidence or to examine witnesses.

If the court finds that it has been proved, by a preponderance of the evidence, that the pregnancy

did result from a violation of Section 261 or Section 285 of the Penal Code, it shall issue an order so declaring, and the committee may approve the abortion. Any hearing granted under this section may, at the court's discretion, be held in camera. The testimony, findings, conclusions or determinations of the court in a proceeding under this section shall be inadmissible as evidence in any other action or proceeding, although nothing herein shall be construed to prevent the appearance of any witness who testified at a proceeding under this section, or to prevent the introduction of any evidence that may have been introduced at a proceeding under this section, in any other action or proceeding.

(c) Nothwithstanding any other provision of this section, an abortion shall be approved on the ground of a violation of subdivision 1 of Section 261 of the Penal Code only when the woman at the time of the alleged violation, was below the age of 15 years.

(d) Notwithstanding any other provision of this section, the testimony of any witness in a proceeding under this section shall be admissible as evidence in any prosecution of that witness for perjury. [Added by Stats 1967 ch 327 § 1.]

§ *25953. Members of committee: Time for termination of pregnancy.*

The committee of the medical staff referred to in Section 25951 must, in all instances, consist of not less than two licensed physicians and surgeons, and if the proposed termination of pregnancy will occur after the 13th week of pregnancy, the com-

mittee must consist of at least three such licensed physicians and surgeons. In no event shall the termination be approved after the 20th week of pregnancy. [Added by Stats 1967 ch 327 § 1.]

§ *25954. "Mental health."*

The term "mental health" as used in Section 25951 means mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint. [Added by Stats 1967 ch 327 § 1.]

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Respondent.

Respondent's Opposition to Petition for Writ of Certiorari

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Certiorari should be denied because this case falls under "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, (this Court's) jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." (*Fox Film Corporation v. Muller,* 296 U.S. 207, 210.)

It is clear that the California Supreme Court held former Penal Code §274 invalid under the due process clause (Article I, §13) of the California Constitution.[1] As seen from the quotation above from *Fox Film,* that it likewise felt the statute to be violative of the Fourteenth Amendment does not give this Court juris-

[1]". . . No person shall . . . be deprived of life, liberty or property without due process of law; . . ."

diction. This case falls squarely within *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487.

In his petition for hearing in the court below, respondent here urged as his first point that (p. 6):

> "CALIFORNIA PENAL CODE SECTION 274 AS APPLIED TO THE DEPARTMENT OFFENDS AGAINST THE GUARANTEES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND AGAINST ARTICLE I, SECTION 13 AND 19 OF THE CALIFORNIA CONSTITUTION"

And in his Supplemental Brief and Reply to Brief Amici Curiae, respondent argued (p. 5):

> "CALIFORNIA'S ANTI-ABORTION STATUTE, PENAL CODE §274, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE CALIFORNIA (Article I, §§ 11, 13 and 21) and UNITED STATES (14th Amendment) CONSTITUTIONS"

Just as did the Indiana Supreme Court in *Jankovich, supra,* so did the California Supreme Court here: make its analysis in the light of both federal and state constitutions. Thus, the Court said (p. 5, Appx. to Pet. for Writ of Certiorari), "We have concluded that the term 'necessary to preserve' in section 274 of the Penal Code is not susceptible of a construction that does not *violate legislative intent* and that is sufficiently certain to satisfy *due process requirements,* without improperly infringing on fundamental constitutional rights." (Emphasis added). And (p. 6, Appx. to Pet.) " 'The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well-estab-

lished element of the guarantee of due process of law [quoting further from and citing decisions of this Court]' *Such also is the law of the State of California.* (Emphasis added.) (*People v. McCaughan,* 49 Cal. 2d 409, 414 [317 P. 2d 974].)" [Name of case italicized in original.]

Further, the California Supreme Court said (Appx. to Petition, 9-10), "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's *and this court's* repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family and sex. (emphasis added) (citing decisions of this and the California courts). That such a right is not enumerated in either the United States *or California Constitutions* is no impediment to the existence of the right." (citing decisions of both courts as well as that of a California Court of Appeal).

Later in its opinion (Appx. to Petition, 15) the California Supreme Court in support of the proposition that "Constitutional concepts are not static," cited a decision of this Court, one of its own and one of the intermediate state appellate court.

And, finally, the court below stated as additional ground for its decision that (Appx. to Petition, 23) the statute delegated legislative authority to the individual, the doctor, director concerned, citing *inter alia,* two, and quoting from one, of its own decisions.

Thus, to paraphrase *Jankovich, supra,* 379 U.S. at 491-492, "nothing in the (California) court's opinion suggests that its conclusion . . . flows from a federal rather than a state source. Indeed, the organization

and language of the opinion indicates that, at the least, state law is an equal ground of decision. . . . [T]here is no intimation that the conclusion . . . is based less forcefully on the (California) Constitution than on the Fourteenth Amendment. (Par.) In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. . . . Under (the) settled decisions (of this Court) the state ground in this case must be regarded as an independent and adequate ground of decision . . ."

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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BRIEF OF AMICI CURIAE (Hereafter Listed) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Interest of Amici Curiae.

Amici Curiae—some thirty-one in number, whose names and professions are given in Appendix II of this brief—are respectively, clergymen and doctors of medicine. Execpt for two of them, they appeared in the Supreme Court of the State of California as *amici curiae* in support of the petitioner here. They were impelled to do so there, as they are here, for these reasons: First, the teachings of the respective churches and congregations with which the clergymen are affiliated are opposed to the practice of voluntary or induced termination of an existing pregnancy; and from time to time various demands are made upon the doctors for advice and

aid in respect of an unwanted pregnancy. As a consequence, the position of the practice in and its treatment by the law is a matter of substantial professional interest to them; and, second, it has been suggested in the course of this cause that statutes prohibiting the practice of abortion, like the one here involved, amount to an unconstitutional establishment of religion—a suggestion which directly affects the practice by *amici curiae* of their professions, and which, in their view is untrue and unsound. They desire to be heard in respect of that suggestion and to oppose its acceptance into the law.

ARGUMENT.

I.

Anti-Abortion Statutes, Identical or Similar in Import to California's, Are of Long Standing and a Part of the Statutory Law of Every State in the Union, Save One. The Decision Sought to Be Reviewed Threatens Their Future Existence and Efficacy. The Question Raised Here, Therefore, Is of Great Public Importance.

With the exception of Maryland, every State of the Union, the District of Columbia, and the territories of Puerto Rico, Guam, Samoa, Virgin Islands and Canal Zone have a statute proscribing abortion.[1] Of these, all but four, like California, except from the proscription an abortion or miscarriage necessary to preserve the mother's life.[2] In virtually every instance the language of the exception is identical with the California language; such variations as exist are, in the great preponderance of instances, no more than matters of style, adding nothing to the certainty of the language or assurance to the physician that his estimate or judgment of need may not be overcome by a jury verdict.[3]

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[1]Maryland had such a statute until 1968 [*Annotated Laws of Maryland, 1957,* §3], when it was repealed. [*Maryland Acts, 1968,* c. 470, §1.]

[2]The statutes are cited and their relevant provisions quoted in Appendix I to this brief.

[3]The language of the California exception is ". . . unless the same is necessary to preserve her life . . ." Twenty of the statutes are identical to California's. In seventeen others the language is identical save for differences that are merely syntactic or verbal—*e.g.*, "the miscarriage" instead of "the same;" or "shall have been" instead of "is;" or "mother's" instead of "her;" or "save" instead of "preserve." Four statutes have no such exception. In the remaining thirteen (Maryland has no statute) the language is different from California's, but either ex-

(This footnote is continued on the next page)

This unanimous proscription of the practice of voluntary abortion is "significant of a widespread belief" which reasonably may be held that there is a compelling interest sufficient to justify legislation restrictive or prohibitory of the practice. [*Cf., Muller v. Oregon*, 208 U.S. 412, 419-421.] The legislative record is strong evidence, too, that it may be and is reasonably believed that it is desirable to permit the practice when it is necessary to save the mother's life; and that to say so in that direct and concise way is sufficient to warn intelligent men that when they essay to perform an abortion with any other purpose in mind than preservation of life, they are entering forbidden territory.

Legislation may be constitutionally based on beliefs so widely held. [*Jacobson v. Massachusetts*, 197 U.S. 11, 30-35; *Muller v. Oregon, supra*, 208 U.S. at 420-421. And see, *Cleveland v. United States*, 329 U.S. 14, 18-19.] To overthrow that legislation on due process grounds is obviously an action that raises constitutional questions of the gravest kind. Further, by that overthrow, California has created a conflict of decision among the States on this very question, as is shown at

---

plicitly or implicitly, they incorporate or adumbrate the standard of necessity or purpose to save the mother's life. In a few of these the physician is given an independent alternative of proceeding after consulting one or several other physicians, or receiving from them a certificate that an abortion is necessary to save the mother's life or to prevent serious injury to her physical or mental health. It is at least strongly arguable that these thirteen statutes, too, are adversely affected by the rationale and holding of the instant case.

Thus, it is evident that the statutory policy of all but four States has been put in jeopardy by the decision in this case. Even the four, in which abortion is prohibited without exception, are in jeopardy, for it was strongly argued below and at least intimated in the State court's opinion that the Due Process Clause of the Fourteenth Amendment prevented any such circumscription of the mother's power to do as she will with her body.

pages 7-14 of the petition here. It is, we suggest, important that the Constitution not mean something different in California from what it does in New Jersey or in any other State that prefers its legislative to California's judicial policy; and that other States in which the question has not yet been decided should have an authoritative guide to a correct result.[4]

II.
The Question Whether the California Statute Is Void for Vagueness Is a Substantial One.

Definitive discussion of the merits of the question whether the California statute is void for vagueness should, no doubt, await action upon the petition for certiorari. At the moment the issue is not whether the State court was right, but whether it decided a question of such substantiality and importance as to deserve the interposition of this Court. Accordingly, we touch the merits lightly and only to show that the question upon which the California court has spoken is a substantial one.

First: The key to the decision below is the State court's evident belief that the statute requires the doc-

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[4]The likelihood that the question will arise elsewhere is not remote. It is common knowledge that there are well-organized groups in this country whose purpose it is to make voluntary abortion lawful. The probability cannot be discounted that there will be a concerted effort throughout the country to accomplish that result by judicial action adopting the California rationale; an effort that no doubt will be carried on with the assistance of organizations such as the American Civil Liberties Union, which was most active in the instant cause in behalf of the defendant doctor. Indeed, immediately after the California decision a suit challenging the constitutionality of New York's abortion laws "was filed jointly by the ACLU, the New York CLU, the James Madison Constitutional Law Institute and the Association for the Study of Abortion." [*Civil Liberties* (Publication of the American Civil Liberties Union), December, 1969, p. 6.] There is every reason to suppose the effort will not stop with New York.

tor, at the risk of his liberty, to speculate on what is meant by the phrase "necessary to preserve her life." [*Petition,* Appendix "A", pp. 5-8, 18-19.] The doctor, the court said, "acts at his peril if he determines that the woman is entitled to an abortion. He is subject to prosecution for a felony and to deprivation of his right to practice medicine . . . if his decision is wrong . . ." [*Petition,* Appendix "A", p. 23.] But, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matters of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death . . ." [*Nash v. United States,* 229 U.S. 373, 377. See, also the cases cited, note 5, *infra.*] It is, therefore, no constitutional objection to the statute that the operating physician must estimate rightly the degree of necessity involved in the case. He is clearly warned by the statute that when he performs an abortion he is entering an area in which he acts at his peril. That is a peril inherent in any statute that prescribes a standard of conduct in terms that necessitate the exercise of some critical or evaluative judgment by the actor. The mere fact of such a standard does not in itself invalidate the statute.[5] The test is whether fair warning of the peril is given. [*Roth v. United States,* 354 U.S. 476, 491-492.] The statute here involved, it is surely arguable,

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[5]For example, standards of that sort have been held not void for vagueness in: *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 108-111 (contracts "reasonably calculated" or which "tend" to fix prices); *Omaechevarria v. Idaho,* 246 U.S. 343, 348 (cattle range "previously . . . or . . . usually occupied by any cattle grower"); *United States v. Alford,* 274 U.S. 264 (building a fire "near any forest, timber or other inflammable material" . . .); *United States v. Wurzbach,* 280 U.S. 396, 399 (solicit or receive "contribution for any political purpose").

gives that warning, for it tells one who performs an abortion for a purpose other than to save mother's life that he is in peril of the law.

Second: As interpreted by the California courts, to convict one of the offense defined in the California statute, it is required that the State prove that the abortion was not necessary to preserve the mother's life. [*People v. Gallardo,* 41 Cal. 2d 57, 62, 257 P.2d 29, 32]; and that the abortion was done with the "intent to commit a criminal abortion, that is, an abortion for a purpose other than to preserve the life of the mother . . ." [*People v. Ballard,* 167 Cal.App.2d 803, 817, 335 P.2d 204, 213; *People v. Arbanel,* 239 Cal.App.2d 31, 34-35, 48 Cal.Rptr. 336, 338-339.] That makes the statute sufficiently certain for constitutional purposes; for it introduces into it a definite and ascertainable element of fact, *i.e.,* intent. The fact of his intent is surely one known to the actor, indeed better known to him than to anyone else. "The state of a man's mind is as much a fact as the state of his digestion . . ." [Bowen, L.J., in *Edgington v. Fitzmaurice,* 29 Ch. D. 459, 483.] The requirement that this fact be proved makes the statute, in at least two ways, constitutionally certain.

In the first place, this Court has fully recognized that "no more than a reasonable degree of certainty can be demanded . . .," and that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." [*Boyce Motor Lines v. United States,* 342 U.S. 337, 340.] And so, it is settled beyond reasonable cavil that a statute is not "void-for-vagueness" because of a generalized delineation of conduct, if that conduct is penalized only when engaged in with

a prescribed intent. [*Screws v. United States,* 325 U.S. 91, 101-105, and the many cases there cited; *Adderly v. Florida,* 385 U.S. 39, 42.] One who, having formed that intent, engages in the kind of conduct in question, has been warned by the statute that he is perilously close to the verge of criminality. The Constitution, as this Court has many times held, requires no more than that. The statute here in issue provides no less, for, unless one who performs an abortion does so for a purpose other than to preserve the mother's life—and the actor knows with certainty what his purpose is—he is in no danger from the statute.[6] [*Ginsberg v. New York,* 390 U.S. 629, 645. *Cf., United States v. Harriss,* 347 U.S. 612, 623-624; *United States v. Ragen,* 314 U.S. 513, 523-524.]

In the second place, the requirement of a specific intent makes the verdict depend—not on the jury's agreement with the defendant's estimate of the degree of necessity—but upon the fact of his state of mind. If he proves a non-criminal state of mind, *i.e.,* the presence of an intent or purpose to save life, he must be acquitted of the charge. Of course, it is no objection to a criminal statute that, after proof of a prima facie case under it and a fair opportunity to the defendant to meet that case by proof, the jury may not credit the defendant's proof.

Third: In arriving at its conclusion that the statute was unconstitutionally vague, the court below rejected an interpretation that, it was argued, would have saved it from that defect. The suggested interpretation was that the statute required the "certainty or immediacy

[6]His danger, if any, is created by the fallibility of human beings and the institutions they man, with the consequent risk in *every* litigation that the trier of fact may err.

of death" as justifying an abortion.[7] That interpretation, the court below felt, "would work an invalid abridgement of the woman's . . . rights to life and to choose whether to bear children . . ." [*Petition,* Appendix "A," p. 10.] Obviously, the lower court was here saying something less than that it was the mother's absolute right, at any time, and for any or no reason, to terminate her pregnancy or cause it to be terminated. What is was saying was that it would be an abridgement of her right to life to deny her, by law, the benefit of a life-saving medical procedure of which she was in need. But, the statute makes no such denial. To the contrary, it expressly permits the procedure when needed for the purpose of saving her life. In that express permission there is no abridgement whatever. The court below, however, was fearful that the risk to the doctor engendered by the statute's supposed vagueness would deter him from performing even a needed abortion. [*Petition,* Appendix "A," pp. 23-24.] Thus, we see that the court's reference to the mother's right is merely a phase of the court's determination that the statute was unconstitutionally vague, and needs no discussion in its own right and separate from the vagueness issue.[8]

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[7]In the opinion as printed in the appendix to the petition, the quoted phrase is rendered as "certainty *of* immediacy." We have quoted it correctly in the text above. [See, 71 A.C. at 1004, 1005, 80 Cal. Rptr. at 358, 359.]

[8]The interest of the State in preserving the life that is certainly to be is no less or different from its interest in preserving the life that is already here. One, as much as the other, is an expression of a regard for the continuity and future of the nation. No one, we suppose, would deny the power and interest of the State to conserve for future generations its resources and natural beauties, even though that conservation involved some restriction on present rights, as for example, the right to bring up and use

(This footnote is continued on the next page)

III.

The Coincidence Between a Statute for Which There Is a Temporal Basis and the Teaching of Some Religious Sect Is Not an Establishment of Religion.

This case was decided as one under the Due Process Clause of the Fourteenth Amendment. The First Amendment, prohibiting establishment of a religion, is a part of the Fourteenth. [*School District of Abington v. Schempp*, 374 U.S. 203, 215-216.] Inherent in the attack upon the statute on due process grounds, therefore, is the contention (which was made below, at least by some of the *amici curiae*) that an anti-abortion statute amounts to an unconstitutional establishment of religion. That contention was based on the fact that

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the oil under one's land or the right to cut down a giant redwood on it. The interest to conserve those future generations, for whom such material conservation is designed, is no less compelling.

The question whether there is an adequate interest to justify such limitation of present rights as is represented by the anti-abortion statute, is itself a substantial one. After all, no right is absolute—not even the right to life, as is attested by the law's recognition of death as a lawful penalty for some crimes, and of killing in self-defense as justifiable homicide. Not even "the family itself . . . nor rights of parenthood" are beyond regulation in the public interest. [*Prince v. Massachusetts*, 321 U.S. 158, 166.] "No well-ordered society can leave to the individuals an absolute right to make final decisions unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far . . ." [Black & Douglas, JJ, concurring in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 643.]

In *Reynolds v. United States*, 98 U.S. 145, 164 [see, also, *Cleveland v. United States*, *supra*, 329 U.S. at 18-19], a statute outlawing polygamy was upheld, notwithstanding the practice was a tenet of the Mormon religion. The statute was upheld largely because the proscribed practice had always been considered an odious one and an offense against society. The practice of abortion is similarly viewed, as shown by the unanimity of legislative opinion against it. That view is at least widespread and substantial enough to justify legislation based on it.

teachings of many religious denominations on the subject, especially those of the Roman Catholic Church, are opposed, on moral grounds, to voluntary abortion.[9] Because of this coincidental similarity of those teachings with the effect of the statute, there is an air of plausibility about the contention. But it cannot withstand a moment's analysis. Churches concern themselves to a marked degree with temporal conduct, seeking to guide it along lines believed to be moral and beneficent. Much of our law is also a guide, even a command, to conduct deemed beneficial to society. If coincidence of purport between the law and religious teaching in these respects were held to be an establishment of religion, a great deal of the law as we know it would be cut down; so much of it, for only one example, as happens to coincide with the Decalogue and its proscription of murder, perjury, adultery and theft. [See, *McGowan v. Maryland*, 366 U.S. 420, 422.]

The question in any case is not whether a law is the same as the teaching of some religious sect, but whether

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[9]The latest expression of the official position of the Roman Catholic Church appears in the Encyclical Letter of Pope Paul VI, July 25, 1968:

> "In conformity with these landmarks in the human and Christian vision of marriage, we must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth."

There is nothing that could properly be called the "official" position of the Protestant or Jewish religions. Views have been expressed by, for instance, the National Council of Churches of Christ, the Chief Rabbi of England, and others in clerical position that indicate no hard and fast policy. On the whole, the position expressed is not one in favor of unregulated voluntary abortion, but in favor only of an exception when necessary to save life or for other weighty therapeutic reasons. [See, Pilpel and Norwick, *When Should Abortion Be Legal* (The Public Affairs Committee, 1969) pp. 6-8.]

there is a temporal basis and justification for the law. [*McGowan v. Maryland, supra*, 366 U.S. at 433-443, and cases there cited; *School District of Abington v. Schempp, supra*, 374 U.S. at 222. *Cf., Everson v. Board of Education*, 330 U.S. 1, 16-18.]

Conclusion.

The petition for a writ of certiorari to the Supreme Court of the State of California should be granted.

Respectfully submitted,

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APPENDIX I.

State and Territorial Abortion Statutes.

ALABAMA: ". . . unless the same is necessary to preserve her life or health . . ." [*Code of Ala. Laws* (Recomp. 1958), title 14, c. 2, §9.]

ALASKA: ". . . unless the action is necessary to preserve the life of the mother . . ." [*Alaska Statutes* (1962), §11.15.060.]

ARIZONA: ". . . unless it is necessary to save her life . . ." [*Ariz. Rev. Stats.*, §13-211.]

ARKANSAS: ". . . shall not apply to any abortion produced by any regular practicing physician for the purpose of saving the mother's life . . ." [*Ark. Stats.*, 1947, §41-301.]

CALIFORNIA: ". . . unless the same is necessary to preserve her life . . ." [*Cal. Penal Code* (1872), §274, amended Cal. Stats., 1935, c. 528, p. 1605, §1.]

CANAL ZONE: ". . . unless the miscarriage is necessary to preserve the life of the woman . . ." [*Canal Zone Code* (1963) title 6, §171.]

COLORADO: ". . . upon written certification by all of the members of a special hospital board that: [c]ontinuation of the pregnancy, in their opinion, is likely to result in: The death of the women [*sic*]; or the serious impairment of the physical health . . . or the serious, permanent impairment of the mental health of the woman . . ." [*Colo. Rev. Stats., Ann.*, §40-2-50.]

CONNECTICUT: ". . . unless the same is necessary to preserve her life . . ." [*Gen. Stats. of Conn.* (Rev. 1958), §53-29.]

DELAWARE: ". . . unless the same is necessary to preserve her life . . ." [*Del. Code Ann.*, §301.]

DISTRICT OF COLUMBIA: ". . . unless the same were done as necessary for the preservation of the mother's life or health . . ." [*D.C. Code Encyc.*, §22-201.]

FLORIDA: ". . . unless the same shall have been necessary to preserve the life of such mother . . ." [*Fla. Stats.*, 1967, §782.10.]

GEORGIA: Absolute prohibition, except "an abortion performed by a physician . . . upon his best clinical judgment that an abortion is necessary because . . . continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health . . ." [*Ga. Crim. Code*, §§26-9920a, 26-9925a.]

GUAM: ". . . unless the same is necessary to preserve her life or health . . ." [Civil and Penal Code of Guam (1962 Supp.). title IX, §274.]

HAWAII: "lawfully justified" if ". . . used for purpose of saving life . . ." [*Hawaii Rev. Stats.*, §768-7.]

IDAHO: ". . . unless the same is necessary to preserve her life . . ." [*Idaho Code*, §18-601.]

ILLINOIS: ". . . necessary for the preservation of the woman's life . . ." [*Smith Hurd Ann. Stats. Ill.*, §23-1.]

INDIANA: "unless such miscarriage is necessary to preserve her life . . ." [*Burns Ind. Stats.*, Crim. Code (1956 Replace.), §10-105.]

IOWA: ". . . unless such miscarriage is necessary to preserve her life . . ." [*Iowa Code Ann.*, §701.1.]

KANSAS: ". . . unless the same is necessary to preserve her life . . ." [*Kans. Stats. Ann.*, §21-410.]

KENTUCKY: ". . . unless the miscarriage is necessary to preserve her life . . ." [*Ky. Rev. Stats.*, §436.020.]

LOUISIANA: Absolute prohibition [*West's Louisiana Rev. Stats.*, §14.87]; but denial, suspension or revocation of doctor's license "unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician . . ." [*Op. cit.*, §37:1285(6).]

MAINE: ". . . unless the same was done as necessary for the preservation of the mother's life . . ." [*Maine Rev. Stats.*, title 17, §51.]

MARYLAND: No statute. A former statute [*Annotated Laws of Maryland*, 1957, §3] was repealed in 1968. [*Maryland Acts*, 1968, c. 470, §1.]

MASSACHUSETTS: Absolute prohibition. [*Annotated Laws of Mass.*, c. 272, §19.]

MICHIGAN: ". . . unless the same shall have been necessary to preserve her life . . ." [*Mich. Comp. Laws*, §750.14.]

MINNESOTA: ". . . unless the same is necessary to preserve her life . . ." [*Minn. Stats. Ann.*, §617.18.]

MISSISSIPPI: except "where necessary for the preservation of the mother's life . . ." [*Miss. Code, 1942, Ann.*, §2223.]

MISSOURI: ". . . unless the same is necessary to preserve her life . . ." [*Vernon's Ann. Mo. Stats.*, §559.100.]

MONTANA: ". . . unless the same is necessary to preserve her life . . ." [*Mont. Rev. Codes,* §94-401.]

NEBRASKA: ". . . unless the same shall have been necessary to preserve the life of the mother . . ." [*Neb. Rev. Stats.,* 1964, §§28-404, 28-405.]

NEVADA: ". . . unless the same is necessary to preserve her life . . ." [*Nev. Rev. Stats.,* §201.120.]

NEW HAMPSHIRE: ". . . unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary to preserve the life of the woman . . ." [*N.H. Rev. Stats. Ann.,* 1955, §585.13.]

NEW JERSEY: Absolute prohibition. [*N.J. Stats. Ann.,* §2A:87-1.]

NEW MEXICO: ". . . likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman . . ." [*N. Mex. Stats.,* 1953, §40A-5-3.]

NEW YORK: ". . . acting under a reasonable belief that such is necessary to preserve the life of such female . . ." [*McKinney's Consol. Laws of N.Y.,* §125.05.]

NORTH CAROLINA: ". . . can reasonably establish . . . is substantial risk that continuance of pregnancy would threaten the life or gravely impair the health of the said woman." [*N.C. Gen. Stats.* (Recomp. 1953), §14-45.1.]

NORTH DAKOTA: ". . . unless the same is necessary to preserve her life . . ." [*N.D. Century Code,* §12-25-01.]

OHIO: ". . . unless such miscarriage is necessary to preserve her life . . ." [*Page's Ohio Rev. Code Ann.,* §2901.16.]

OKLAHOMA: ". . . unless the same is necessary to preserve her life . . ." [*Okla. Stats. Ann.*, §861.]

OREGON: ". . . unless the same is necessary to preserve the life of such mother . . ." [*Ore. Rev. Stats.*, §163.060.]

PENNSYLVANIA: Absolute prohibition. [*Purdon's Pa. Stats. Ann.*, §4718.]

PUERTO RICO: ". . . unless the same is necessary to preserve her life . . ." [*Laws of Puerto Rico Ann.*, title 33, §1053.]

RHODE ISLAND: ". . . unless the same is necessary to preserve her life . . ." [*Gen. Laws of R.I.*, 1956, §11-3-1.]

SAMOA: ". . . unless the same shall be necessary to prevent permanent injury to or the death of such woman . . ." [*Code of American Samoa* (1964 Supp.), §4.0402.]

SOUTH CAROLINA: ". . . unless the same shall have been necessary to preserve her life or the life of such child . . ." [*S. C. Code of Laws* (1962), §16-82.]

SOUTH DAKOTA: ". . . unless the same is necessary to preserve her life . . ." [*S.D. Comp. Laws* (1967), §22-17-1.]

TENNESSEE: ". . . unless the same shall have been done with a view to preserve the life of the mother . . ." [*Tenn. Code, Ann.* (1955), §39-301.]

TEXAS: Absolute prohibition [*Vernon's Tex. Stats.*, 1948, art. 1191] unless "procured . . . by medical advice for the purpose of saving the life of the mother." [*Op. cit.*, art. 1196.]

UTAH: ". . . unless the same is necessary to preserve her life . . ." [*Utah Code,* 1953, §76-2-1.]

VERMONT: ". . . unless the same is necessary to preserve her life . . ." [*Vt. Stats. Ann.,* title 13, c. 3, §101.]

VIRGINIA: ". . . done in good faith, with the intention of saving the life of such woman . . ." [*Code of Virginia,* §18.1-62.]

VIRGIN ISLANDS: ". . . unless necessary to preserve her life . . ." [*Virgin Islands Code Ann.* (1964), title 14, §151.]

WASHINGTON: ". . . unless the same is necessary to preserve her life . . ." [*Wash. Rev. Code* (1952), §9.02.010.]

WEST VIRGINIA: ". . . act is done in good faith, with the intention of saving the life of such woman or child." [*W. Va. Code,* §61-2-8.]

WISCONSIN: ". . . therapeutic abortion . . . necessary, to save the life of the mother . . ." [*Wisc. Stats.,* 1967, §940.04.]

WYOMING: ". . . unless such miscarriage is necessary to preserve her life . . ." [*Wyo. Stats.,* 1957, §6-77.]

APPENDIX II.

Names of Amici Curiae.

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